IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 75-5014

JEFFERSON DOYLE

Petitioner

vs.

STATE OF OHIO

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FIFTH JUDICIAL DISTRICT OF OHIO

JAMES P. WILLIS, ESQ.
Attorney for Petitioner
1212 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
216/523-1100

RONALD L. COLLINS
Prosecuting Attorney
Tuscawaras County
Courthouse
New Philadelphia, Ohio 44663

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Statutes

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. _____

JEFFERSON DOYLE

Petitioner

vs.

STATE OF OHIO

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FIFTH JUDICIAL DISTRICT OF OHIO

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Jefferson Doyle, prays that a writ of certiorari issue to review the judgment of the Ohio Court of Appeals, which judgment became final on April 25, 1975, when the Supreme Court of Ohio denied further appellate review.

OPINIONS OF THE COURTS BELOW

The judgment entires by the Supreme Court of Ohio, denying further review are attached hereto as Appendices "A" and "B", infra, at pages 29 and 30. The entry filed by the Ohio Court of Appeals, the judgment to which this petition is directed, is attached hereto as Appendix "C", infra, at page 31. The entry of the Court of Common Pleas is Appendix "D", at page 47.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on April 25, 1975. The jurisdiction of this Court is invoked under Title 28, U.S.C., §1257(3), on the basis that rights, privileges, and immunities under the United States Constitution are contended to have been violated.

STATEMENT OF QUESTIONS INVOLVED

1) Whether an accused who asserts his right of silence and his right to counsel following his arrest properly subjects himself:

   a) to questions as to why he did not protest his innocence at the point of arrest, at the Preliminary Hearing, or at some time earlier than at the trial;

   b) to the prosecutor's argument to the jury that an unfavorable inference could be drawn against the accused as a consequence of his having exercised these constitutional rights;

   c) to questions as to why he did not consent to the search of the car (thus necessitating obtaining a search warrant) and to an argument on this point.

2) Whether a defense witness who was arrested and charged along with the defendant on trial can be properly asked why he did not protest his innocence earlier than at the trial, and can the prosecutor argue this point to the jury?

3) When the prosecution's case rests almost exclusively on the testimony of a paid informant, who was in quest of some leniency insofar as a sentence then pending against him was concerned, can the Court properly refuse to give the jury special cautionary instructions on the unreliability of witnesses of this ilk?

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES

Constitution of the United States, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Amendment V:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Amendment XIV:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ohio Revised Code, Section 3719.44(D):

"No person shall sell, barter, exchange, or give away, or make offer therefor, any hallucinogen except in accordance with sections 3719.40 to 3719.49, inclusive, of the Revised Code."

STATEMENT OF THE CASE

Jefferson Doyle was convicted in this cause for an alleged violation of the State's Narcotics Drug Law. More specifically, the charge stated that on or about April 29, 1973, petitioner sold marijuana to another in violation of P.C. of Ohio, §3719.44(D). Following his conviction on this single count, he was sentenced to the Ohio Penitentiary. This judgment was appealed on questions of law to the Court of Appeals for the Fifth District of Ohio, where it was affirmed. The Supreme Court of Ohio denied leave to appeal. This action is a result of the judgment of the Ohio Court of Appeals.

The appeal in this cause (--that is, Court of Appeals Case No. 1108) and that of Richard Wood (Court of Appeals Case No. 1109) were heard and determined simultaneously by the Fifth District Court of Appeals. The entries made in both of the appeals thus are relevant for a correct assessment of the relevant finding made. For this reason both entries are attached to this Petition as appendices. (State v. Wood is Appendix "E" at p. 49.)

STATEMENT OF FACTS[1/]

I

Bill Bonnell, a convicted felon, with a record of considerable length, as well as an admitted liar, testified that he bought a quantity of marijuana from Jefferson Doyle.

The veracity of Bonnell's testimony, which will be discussed more fully herein, must be measured against facts

---

1/ In this Petition (R--) refers to pages from the transcript of proceedings at the trial.

showing that he was a paid informer. In addition, he not only had every reason to lie, but also admitted that where lying was to his own best interest he would do so again (R 206,230).

The overall importance of Bonnell's testimony revolves around the fact that he is the only person other than Jefferson Doyle and Richard Wood who was present during the alleged transaction. None of the officers who testified, save Captain Griffin, even asserted that they had seen any transfer take place. More specifically, Kenneth Beamer testified that he did not see the actual transfer but that Detective White and Captain Griffin told him they had (R 20). Detective White, however, testified not only he did not see this (R 80,321 & 322), but added he never told Beamer he had (R 67).

As to Captain Griffin, although he could not see the alleged transfer when he testified at the Preliminary Hearing (R 362,363), at trial he indicated he had done so. This he maintained despite being 200 feet away, in the middle of the night, in a deserted parking lot surrounded by foliage. In addition to this, during a pre-trial motion, Griffin says he saw Bonnell go to the passenger side of the vehicle (R 97). It was at that time, according to him, Mr. Wood got in the car and then Bonnell received a package through the window. However, during the trial (R 345), this officer testified that a large sack was passed through the window to Bonnell and at that point the passenger in the pickup--that is, Mr. Wood--got out and walked around behind the pickup and got into the passenger side of the automobile.

To be sure, the record shows Griffin's testimony at trial conflicts with his testimony at the suppression hearing. Both of these, in turn, conflict with his testimony at the Preliminary Hearing and with the testimony of Bonnell to the effect that he received the package through the window on the driver's side. In any event, it should be noted that there is no mention ever that petitioner Doyle moved over from the driver's seat to the passenger window in order to accomplish the feat of handing out the package.

Synthesized, if the testimony Captain Griffin first gave (R 97) is to be believed, Doyle could not have passed the package because Wood would have been between Doyle and Bonnell. So structured, it would have had to have been Wood who passed the package to Bonnell through the passenger window to the informer.

Of course, all this, including Griffin's testimony, conflicts with Bonnell's testimony, which was that he got out of the pickup and went around the front of the car where Doyle passed the contraband through the window on the driver's side of the car (R 164). It is obvious, therefore, on this point that one or both of the witnesses were less than honest.

To further shed light on the veracity of these witnesses, it should be pointed out that in the testimony of Bill Bonnell (R 242), he admitted having discussed with the officers, in detail before the trial, which side of the truck he had gotten out of and generally reviewed with them what had allegedly transpired. This obviously accounts both for the apparent failure of these officers to give a consistent version initially, and for Griffin's contradictory and unrehearsed version at the Preliminary Hearing on this point (R 362). The simple explanation is that they did not see the transaction take place.

Again, the State's case was dependent upon the testimony of a paid informant and convicted felon, Bill Bonnell. As such, his veracity and the ulterior motives behind his actions were extremely important. It must be re-emphasized that this was the testimony of a convicted felon, sentenced to the Ohio Penitentiary, desperate to do anything to get out--even turn in his childhood friends and lie (R 206)--so that certain officers would come forward in his behalf at his shock probation hearing that was then pending. He also admitted that he would not testify but for the threat of prosecution for additional crimes against him if he failed to do so (R 230).

Capsuled, it was Bonnell's testimony that he was contacted by Jefferson Doyle relative to a transaction for the sale to him of a quantity of marijuana. In response to this, they agreed to meet at a tavern in Dover.

He then contacted the authorities. In league with them, he testified to the preparations made to keep him under surveillance during the proposed transfer.

His evidence further showed that following the initial rendevous in Dover, he and Wood, in his truck drove to New Philadelphia where they waited for Jeff Doyle, who according to him left to get the merchandise. He then testified the substance was transferred to him by Doyle.

He admitted that later he did contact Marinelli, and through him arranged to meet with either Doyle or Wood. Also, it was his testimony that a meeting did take place at the Delphian Inn. Present at this time were Mr. James, Wood's attorney, Wood and Marinelli.

Prior to trial, the Court denied a motion calling for the suppression of certain physical evidence seized in this case. The property sought to be suppressed had been seized from the Wood vehicle on the basis of a search warrant issued following the arrests of Doyle and Wood. These arrests had occurred in New Philadelphia shortly after they were observed in the parking lot where Bonnell says the contraband was turned over to him.

The crucial property seized from the car was the money that had been supplied Bonnell, and which in turn was allegedly given to Doyle in exchange for the marijuana.

II

For his defense, Doyle testified that while he was in an Akron bar, he overheard a casual conversation in which one Vince Cercone, a resident of New Philadelphia, had mentioned that Bill Bonnell was dealing in marijuana (R 465). As Doyle recalled the events, Richard Wood, who was also present, indicated he was going down to Steubenville to see his daughter (R 467). Doyle says he then asked Wood if he would drop him and his wife off at Doyle's sister's home and pick them up on his way back. Doyle's sister, the evidence shows, lived in Sherrodsville (R 469).

Having decided to come to this area, Doyle says he then called Bill Bonnell, whose number he obtained from a Jim Russell who also lives in this area (R 467). In talking to Bonnell, Doyle stated he first asked if he was dealing in marijuana. Upon receiving the proper indication, he then asked Bonnell to make a sale to him (R 468). This then prompted Bonnell to say they could meet that night at a named bar in Dover (R 468).

After Doyle had picked up his wife, they proceeded to Doyle's sister's house in Sherrodsville. There the wife

was dropped off and they made their way to Dover when Doyle met with Bonnell.

In recalling his conversation with Bonnell, Doyle testified:

A I started talking to Bill and I -- about buying some marijuana and he said he had some. I asked him how much, and he said it was $175.00 a pound. If I'd take them all, he'd make me a deal. I believe his first offer was $1200.00 for all of them and I thought about it, then he said maybe he could even do it for $1000.00, and I said, --'I don't know if I can get the money." He said -- 'Well, what can you come up with?' I said, - 'I got to go out and see how much money my wife had.' and I was figuring then she had about $130.00 or $140.00. I had Forty some dollars on me and I knew that Woody had some money on him, and I knew that if I asked for it, Woody would trust me to loan it to me because he knows I'd pay him back.

Q Do you know how much money Woody had on him?

A I don't know exactly but I knew it was right around $1,000.00.

Q Then, what happened?

. . . . . .

A I was going to go out to my sister's house to see if I could get the money to buy all ten pounds. I started out to my sister's. I told Bill, you know, -- 'Where can we meet later?' Bill said, -- I said, -- 'Do you want me to come back here?' He said, -- 'No, I'll meet you behind Club 224.' I said, -- 'Okay.' So I started out to my sister's and I got to thinking, -- 'What am I going to do with it?', -- you know, with that much marijuana.

Q Let me ask you, Mr. Doyle, -- do you smoke Marijuana?

A Yes Sir. I have.

Q How long have you been smoking Marijuana?

A First time I smoked it is when I was sixteen years old.

. . . . . .

Q So when you came to Dover, you were looking for some marijuana to smoke. Is that right?

A Yes Sir.

Q Now, after, you say that you went out to see if you could get your money at your sister's house, what happened at that point, when you started out to your sister's house?

A I didn't know what I was going to do with that much marijuana.

Q What happened?

A I changed my mind and decided to go back and see if I could buy one pound.

Q Then what happened?

A I turned around and came back.

Q Came back into New Philadelphia?

A Yes Sir.

. . . . . .

Q Tell us that happened when you got back in behind the Club?

A I was sort-of scared and I was looking around and didn't see nobody and Bill came up to the side of my truck, - or my car, -- He came from his truck up to the side of my car and he said, --'Did you get the money?', and I said, -- 'I can't get that much money but I only want to buy one pound.' He said, -- 'Why did you tell me you wanted it all?' I said, -- 'Well, I wanted it all but I don't know what I'm going to do with it and I don't know anybody to get rid of that much to.' He said, -- I believe he got upset about it because he said he didn't want -- if I only wanted one pound, why didn't I say so, so he'd only brought one pound. Something of that nature. That's how the conversation went. I can't say word for word because I was nervous at the time.

. . . . . .

Q At that point, when you indicated to him you only wanted to buy less than all of this, what did he do? Mr. Bonnell?

A He said, -- 'Forget it.' He said something else. He was pretty upset about it. Then he went around and got back in his truck.

Q Incidentally, was the window down on your car?

A Yes.

Q The car you were driving?

A Yes Sir.

Q Then what happened?

A He went around and got in his truck and Woody, -- I guess at the same time, it seemed like, - Woody came around and got in the car.

Q When Woody got into the car, what do you recall happening?

A That's when Woody asked me what the money was doing in the back seat. I didn't know there was money in the back seat. Apparently, Bill threw it in there. I didn't even know it was there til that time (R 470-475).

Distilled, Doyle's testimony was to the effect that he had been framed. And, that it was because he sensed this to be the case, he then drove through the streets of New Philadelphia looking for Bill Bonnell. It was during this period they were seen by the police and were later arrested.

During his cross examination the prosecutor, with the expressed approval of the Court, asked Doyle if he was innocent. Receiving an affirmative response he then asked him the rhetorical question, "That's why you told the police... about your innocence?" (R 504). This question, after the judge's prejudicial contribution to its effect, caused him to reply, "I didn't tell them about my innocence. No", and that he did not tell them he had been set up, nor did Wood (R 504-505).

Not satisfied with these responses, and apparently inspired on both by the Court's apparent unwillingness to protect Doyle against being penalized for having exercised his rights at the point of arrest, and to further prejudice the defense with the jury, the prosecutor, in his quest for a conviction, pressed on. At this point, he asked Doyle whether the arresting officers had asked him if they could search. When given the response that it was not his car, the prosecutor just had to inquire "why didn't [he] consent to a search" (R 505), why didn't he protest his innocence at the time the car was searched, and why didn't he protest his innocence at the Preliminary Hearing after he heard the accusatory testimony of the officers (R 507-508). Even this is not all, he forced Doyle to admit the first time he (Doyle) had given his version of the facts was during his testimony at the Wood trial (R 508).

Richard Wood also testified as a defense witness, as did a Louis Marinelli. Wood's evidence was to the effect that he had absolutely nothing whatsoever to do with any transaction between Bonnell and Doyle. Further, that he was, as Doyle testified, en route to Steubenville to visit his family (R 444). His evidence, which agreed with Doyle's, was that when he entered the car, behind the club (R 224), he spotted the money "on the back seat" (R 450). Following this he says he gathered it up.

According to this witness, they started chasing Bill Bonnell after Doyle remarked, "he had been had" (R 451).

Wood, too, was asked if he had told the police he had been set up (R 455). Wood was further questioned as to whether he had taken the "witness stand" and told the judge (at the Preliminary Hearing) he had been set up (R 456).

Consider, also, on this same point, the following almost unbelievable segment of the record:

Q So upon your arrest, you didn't tell anybody you had been 'set up' and why you were chasing Bonnell?

. . . . . .

A No Sir.

Q And you didn't testify in your own defense at the Preliminary Hearing prior to indictment in this case?

A No Sir.

Q And you didn't testify in your own defense at the Preliminary Hearing prior to indictment in this case?

A No Sir.

. . . . . .

Q So the first time you testified as to the facts in this case was at your trial?

. . . . . .

A Yes Sir. (R 457-458).

The fact that each of these questions was objected to really magnifies our problem.

III

Following the close of all the evidence the defense renewed the various motions made at the close of the State's case. These included the Motion for Judgment of Acquittal that had been summarily denied (R 510, 422). Also denied were certain special instructions. The most crucial of these, and the two which we claim it was prejudicial for the Court not to at least incorporate in its general charge were Nos. 1 and 2. Specifically, these instructions, as submitted, stated:

1. The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by his interest, or his prejudice against defendant.

2. In this case William Bonnell, according to his own testimony is a self-confessed criminal and is currently under sentence for several criminal acts. If you believe Mr. Bonnell was induced to testify in this case by any promise of immunity or that any hope was held out that he would be rewarded or in some way benefited if he implicated the defendant in the crime charged herein, or if he believed he would so benefit even if no such promise were made, then you may consider such fact in determining what weight should be given to his testimony.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

I

The Assertion Of A Constitutional Privilege Is Not Properly Part Of The Evidence To Be Considered By The Jury, And No Inference Can Be Legitimately Drawn By The Jury As A Consequence Of A Witness Having Exercised This Right.

No one except perhaps an overly zealous "law and order" advocate in some alien society would ever contend that when one exercises his constitutional rights he does so under the threat that he can be penalized thereby. Why this is so could not be more obvious. For, to be sure, this Court, in a number of cases, has effectively concluded that to penalize the exercise of a constitutional privilege would make a mockery of the Constitution.

The factual background for our contentions, at this juncture, shows our petitioner was asked: (a) if he

told the police his defense when he was arrested (R 504,505,507); (b) whether he consented to a search of the car (R 505,506); (c) whether he told the Court at the Preliminary Hearing his defense (R 508); and (d) whether he ever revealed his version of the events prior to testifying in the trial of his co-defendant (R 508).

Wood, a defense witness, was asked, and compelled to answer, over vigorous and persistent defense objections: (a) whether he protested his innocence at the point of arrest (R 455,456,457); (b) whether he told the Court at the Preliminary Hearing his defense (R 456-457); and (c) whether he ever revealed his version of the events prior to testifying in his own trial (R 458).

Also, the record shows, the prosecutor with the avid support and sanction of the Court, argued most, if not all, of these points to the jury (R 515, 526-527).

Given the aggressive tenor of the prosecutor's questions, designed to show (as they did) that Doyle did not either at the point of arrest, or any other time prior to testifying, personally reveal his defense; if it is determined these questions were improper, then there can be no valid contention that they were harmless. However, even if it were possible to view the mere asking of such questions as harmless, the fact that the trial judge aggressively sanctioned them, greatly magnified the prosecutor's final argument, and compounded these abuses of due process.

Viewed in still another sense, if the questions asked, and the argument made, had not been developed with a full and complete awareness of the Ohio Supreme Court's decision in State v. Stephens, 24 Ohio St 2d 76 (1970), then we could at least attempt to rationalize his having committed these faux paus. But the fact is, these same tactics were employed in the companion case (State v. Wood) and the prosecutor was furnished in that case with the citation to Stephens. Stated another way, it has to be, if our contention that these questions and the argument were improper, that it was done willfully.

It would seem that the mere citation of Miranda v. Arizona, 384 U.S. 436 (1964), as authority for the proposition that Doyle was under no obligation to make any statements should suffice. If then he was under no obligation to make any statement, it perforce follows he could not be penalized for having exercised this right. This being the case, the prosecutor's argument has to be regarded as an effort to create evidentiary value out of this circumstance.

At least as to the argument aspect of our position here, our Supreme Court's decision in State v. Stephens, supra, appears to be on all fours with this case. In Stephens, the Court was dealing with a factual pattern which showed the prosecutor arguing, "Why did he not tell the police at the shopping center, 'Hey... look this prescription that you found, this is a good one... Why didn't he tell the police?" An objection made to this argument was overruled. Under these circumstances, that Court concluded that, "Obviously such action has a prejudicial effect, and to allow such comment would completely circumvent an accused's privilege against self-incrimination."

More precisely to the point is the Court's reference in Stephens, to State v. Davis, 10 Ohio St 2d 136; 226 NE 2d 736 (1967), which refers specifically to the prosecutor's comment upon the defendant's refusal to testify at a Preliminary Hearing. In that case, too, comment by the prosecutor

concerning defendant's refusal to testify at the Preliminary Hearing, was held to be prejudicial error.

Also, as to the propriety of the questions directed to Doyle relative to his not having disclosed his defense at the Preliminary Hearing, the decision of State v. Minamyer, 12 Ohio St 2d 67, 232 NE 2d 401 (1967), provides an almost perfect analogy. In the Minamyer case, the Court specifically dealt with the question as to "whether the prosecuting attorney during the trial of an accused may... comment upon the... accused's refusal to testify before the Grand Jury." there, the Court held that to allow a prosecutor to

> "comment upon the refusal of an accused to testify before a grand jury would have equally prejudicial effect and to allow such comment would completely circumvent an accused's constitutional privilege against self-incrimination. Therefore, in a criminal prosecution a prosecuting attorney may not testify as to or comment upon the refusal of the accused to testify before the grand jury." (Id, 232 NE 2d, at 403.)

The fact that the Minamyer decision went on to hold that the instructions given to disregard this gross impropriety did not cure the error, aggravates the wrong in our case where it was committed with the fullest possible judicial sanction.

The reasons argued above (and specifically assigned below as errors and numbered 5, 6, 7 and 8) surely qualify as valid, and as such were sufficient to entitle this petitioner to a new trial. But this was not to be, as the Court of Appeals took the very strange position that the assailed cross examination was proper because the resultant disclosures, all of which were argued to the jury, had a proper bearing on the credibility of the witness and the accused. Even more strangely, the Supreme Court of Ohio refused to review his specific holding.

As to this expressed position (which is consistent with the one argued by the State below), Harris v. New York, 401 U.S. 222 (1971) is said to have sanctioned the forced disclosure that the right of silence and that of counsel had been exercised (Answer Brief, p. 17).

To begin with, the fact that an accused has a right to counsel and to remain silent not only following his arrest but while he is in custody is beyond dispute. Constitution of the United States, Amendment V; Miranda v. Arizona, 384 U.S. 436 (1966). A corollary of this principle is the proposition that the prosecution is not permitted to impermissibly burden, or otherwise penalize one for having exercised either of these rights. Griffin v. California, 380 U.S. 609 (1965).

Given the view expressed in Harris v. New York, to the effect that "prior inconsistent... and conflicting statements" obtained in violation of the Constitution (and this would include, as the State sees it, the failure to consent to a search of the car) can be used for the limited purpose of impeachment at the trial; the question then is the assertion of these rights inconsistent with innocence.

In Gruenwald v. United States, 353 U.S. 391, 415-424 (1957), this Court expressly held that a prior assertion of the right of silence was not inconsistent with a later assertion of innocence (id, at 423-424). Other cases approving this approach have made the point that an accused cannot be penalized for exercising his right of silence (Fowle v. United States, 410 F 2d 48 [1969]), and for the additional reason that a comment on an accused's failure to speak out

at the point of arrest, or while in custody operates to punish him for availing himself of the right of counsel. Fagundes v. United States, 340 F 2d 673, 677-678 (1965).

Given these holdings, it is apparent that Harris v. New York simply does not apply to this case. But even this is not all. Simply holding that Harris is inapplicable to these facts is only the short answer. The position taken by the Court of Appeals on this point is intrinsically unsound for other cogent reasons. Not the least of which is the fact that even if reliance on these rights were inconsistent with innocence, and that such could be shown for the limited purposes indicated by the Court of Appeals, the fact that no limiting instructions were given becomes a factor.

But again, it must be that the law here that silence following an arrest is not inconsistent with innocence, being rather the simple exercise of a right to which all are entitled without qualification. See Gillison v. United States, 399 F 2d 586 (1968). If this is not the case then the Miranda warning in Ohio should be changed so as to inform an accused that he has the right of silence and to counsel, but that if he waives them anything he says can be used against him. Further, that if he fails to waive them then the fact that he did so could also be used against him. McCarthy v. United States, 25 F 2d 298 (1928). Also see United States v. McKinney, 379 U.S. 259 (1967).

II

Where The Prosecutor's Case Rested Almost Exclusively On The Testimony Of A Paid Informant (Who May Have Been An Addict At The Time Of The Alleged Occurrences And At The Time Of Trial), The Accused Is Entitled To Cautionary Instructions On The Unreliability Of Testimony By A Witness Of This Ilk.

In this case, a serious dispute existed as to whether there had in fact been any purchase or sale of marijuana. Hence, the question, simply put, was whether the paid informer and convicted felon, Bill Bonnell, had indeed testified truthfully as to his asserted dealings with Jefferson Doyle.

Since there was no meaningful corroboration for any of Bonnell's testimony, the jury was required to decide if Bonnell could be believed beyond a reasonable doubt.

Most courts, of course, recognize the serious credibility questions inherent in the use of informers. Doubtless it was this reason, and to make sure that witnesses of this type were properly identified as such, that led this Court, in On Lee v. United States, 343 U.S. 747 (1952), to state:

> "The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may weigh serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to prove the credibility by cross-examination and to have issues submitted to the jury with careful instruction."

Thus, where, as here, the informer's incriminating testimony is uncorroborated or unsubstantiated, in its critical aspects, special cautionary instructions are required. See Orebo v. United States, 293 F 2d 747 (1961), and Joseph v. United States, 286 F 2d 486 (1961).

A further aspect of this issue as presented here involves the restrictions placed on the defense examination of Bill Bonnell as to his possible drug dependence. This dependence, if shown, could have been of extreme importance in evaluating this witness' credibility. In this regard, the following segment of the record is significant:

(By Mr. Willis)

Q You used drugs, didn't you?

MR. CUNNINGHAM: Objection, Your Honor.

THE COURT: Sustained.

Q Mr. Bonnell in your life have you ever used narcotics?

MR. CUNNINGHAM: Objection.

THE COURT: Sustained.

Q You know what narcotics is, don't you?

A Yes.

Q Now specifically referring to benzedrine, do you know what that is?

MR. CUNNINGHAM: Object, Your Honor, we are talking about 10 lbs. of marijuana.

MR. WILLIS: We are talking about his credibility too.

THE COURT: Objection will be sustained.

Q Did you ever testify that you use narcotics, Mr. Bonnell?

MR. CUNNINGHAM: Objection!

Q Isn't it a fact that you testified that you used --

MR. CUNNINGHAM: Objection!

MR. WILLIS: (Continuing) Benzedrine?

MR. CUNNINGHAM: Object!

THE COURT: It appears irrelevant unless it can be shown otherwise the objection will be sustained. (R 178).

As evidenced by the position taken by the prosecutor and sanctioned by the Court, a possible addict-informer is to be protected from exposure of the fact of any drug dependence. The propriety of this view thus becomes an essential aspect of this branch of our argument. For, if we were entitled to explore this avenue, then it was surely prejudicial for the Court to deny us that opportunity.

While there are no Ohio decisions dealing directly with this rather sophisticated issue, the rather recent decision of United States v. Kinnard, 465 F 2d 566 (1972), seemingly must be reckoned with. Here, the D. C. Circuit Court held that the drug dependence by a witness is a legitimate area for exploration and that it is prejudicial for a court to disallow even the development of a basis for the introduction of extrinsic evidence to prove addiction or dependence.

Essentially, at this juncture, it is being contended that defense counsel was prohibited from showing that the witness Bonnell was dependent upon drugs both at the time of the alleged transaction and at the time of trial.

In this case, of course, there was little if any corroboration for Bonnell's version. However, even where the informant's testimony is corroborated, many jurisdictions favor instructions which are calculated to call the jury's attention to the inherent untrustworthiness of these informer witnesses. The sufficiency of any instructions depends upon the circumstances that tend to corroborate the informer. In

Fletcher v. United States, 158 F 2d 321 (1951), the court held that,

> "granting that the credibility of the testimony of a paid informer is for the jury to decide, it nevertheless follows that where the entire case depends upon his tesitmony, the jury should be instructed to scrutinize it closely for the purpose of determining whether it is colored in such a way as to place guilt upon the defendant in furtherance of the witness' own interest. Here... the usefulness of the witness--and for which he received payment--dependent wholly upon his ability to make out a case. No other motive than his own advantage controlled him in all that he did. Because of this, it was necessary to give special cautionary instructions on his unreliability. Failure to give these instructions is reversible error unless the informer's testimony is fully corroborated by other eyewitnesses." (Emphasis added.) Also see Hardy v. United States, 343 F 2d 233 (1964).

Here, since Bonnell's testimony was virtually uncorroborated in any of its material aspects, the necessity for the special instructions was critical. It was stated in Kinnard, supra, that:

> "The trial court should be prepared to caution the jury to weigh with extreme caution the testimony of an addict informer that is uncorroborated in some material respect, because of the possibility of the addict's special interest and motive to fabricate." (465 F 2d, at 572.)

The Court further stated that extrinsic evidence of addiction is not collateral but that it goes to the motive of the informer to lie. This further bolsters petitioner's argument that the scope of the cross-examination should not have been stymied. (Other cases that have considered the propriety of instructions on this point include United States v. Griffin, 382 F 2d 823 [1967]).

However, our position with reference to the Court's failure to give any cautionary instructions is not dependent on the analysis given above. Doyle's entitlement to an instruction, pure and simple, was based on the inherent untrustworthiness of informers, especially those who become such for ulterior motives. It is beyond dispute that informers of this type create a special problem that jurors must be made aware of.

Further background for our position is supplied by the fact that the special instructions tendered the Court would have focused in a meaningful way on the testimony of this informer.

In order that the real depth of this issue be determined, the following specific testimony brings to bear the importance of the requested instructions and why their rejection was so prejudicial:

(By Mr. Willis)

Q At least, we have established that you will lie?

A I have lied. Yes.

Q You will lie in the future if it serves your own best interests, wouldn't you?

A Possibly.

Q Probably?

A Possibly.

Q It's only possible that you would lie?

A Yes.

Q It would serve your interests, at least you thought so, in April, if you could prove your invaluable assistance to the Narcotics Squad in ridding the community of drugs, wouldn't it?

A Yes, it would.

Q Yes, and it would be a bigger feather in your cap if you could capture dope, a big sale, than it would be if you just caught somebody with a couple of lids, or a few joints, wouldn't it?

A Yes.

Q Right. And you knew that your chances of going back to the Penitentiary at that time, were pretty good since the Court of Appeals affirmed your conviction, you knew that, didn't you?

A Right. Yes (R 205-206).

In a similar vein the following testimony of Bonnell is also relevant:

(By Mr. Willis)

Q Just before these trials started, you were told, weren't you, that if you didn't come to Court and testify the way you had stated this thing happened to the officers, that they would charge you with obstructing justuce [sic], and a number of other things.

A Yes.

Q So they threatened you. The officers?

A Yes. -- No, it wasn't the officers. It was the Prosecuting Attorney that I talked to.

Q Well, he threatened you?

A He told me if I refused to testify, I would be charged with obstruction of justice, among other things.

Q That's a threat, isn't it? Or is it a promise?

A It's probably a promise.

Q So you're testifying under the cloud of the Prosecutor's promise that if you didn't testify as you stated, originally, this incident occurred, you'd be charged with Obstructing of Justice. That's right, isn't it?

A Yes.

Q And you told us that you would lie if it was in your best interest to do so?

A Right.

Q Right. So that it would be in your best interest to lie, to avoid being charged with Obstructing Justice and a number of other things. Right?

A Yes (R 229-230).

It is glaringly apparent from this testimony that the special cautionary instructions were required, as all the underlying reasons justifying such instructions were surely present here regardless of whether Bonnell was an addict. However, the fact that cross-examination as to his possible drug dependence was curtailed is but another reason such instruction should have been granted. Thus, the failure of the trial court to allow such examination only compounded the injury to the appellant.

Concededly, the court was under no obligation to give the requested instructions in the language submitted by counsel. However, the Court was at least required to incorporate the type of instruction to which the request related in its general charge. The Court's failure to do this made our Assignment of Error No. 9, to which this argument was addressed valid. The same validity label should have applied to Assignment No. 3, as the Court's curtailment of our cross examination of Bonnell simply cannot be defended.

CONCLUSION

In this case, the Court permitted the prosecutor to argue that, "If you don't feel that we, representing the State of Ohio, proved our case 'beyond a reasonable doubt,' it is your duty to acquit this defendant, but to do so, you are going to have to disbelieve [Officers] Griffin, White, Beamer, [and] me" (R 527).

Given the fact that the prosecutor was not a witness, something has to be wrong with this type of argument

which so obviously added to the weight of the case against this accused the prestige of the prosecutor in the small town of New Philadelphia, Ohio, where this case was tried. The fact that this gross impropriety was done subtly, does not diminish the fact that it had to be deliberate. See State v. Thayer, 124 Ohio St 1 (1931).

Stated another way, the prosecutor's "personal status [in this community] and his role as spokesman for the government tend[ed] to give what he [said] the ring of authenticity... tend[ing] to impart an implicit stamp of believeablity." Hall v. United States, 419 F 2d 582 (1969).

But, of course, this substantial flaw in Doyle's conviction is meager compared to the other wrongs by which he was victimized.

Given this Court's decision in United States v. Hale, ___ U.S. ___ (decided only yesterday, hence not in time for a more amplified inclusion in this Petition, because of the deadline for filing prevented a rewriting of this Petition); it seems clear our case, and the companion case of Wood v. Ohio, ought to be considered by this Court on its merits. For not only did we have here questions and comments on the exercise of the right of silence, but the right to consult counsel too was commented on; as was the fact that petitioner and his co-defendant did not consent to the search of their car.

Since this Court obviously was not persuaded in Hale to alter the Miranda formula to read that "if you say anything, it will be used against you; if you do not say anything that will be used against you" (McCarthy v. United States, 25 F 2d 298 [1928]), it seems only right that the Hale approach should be applied here.

For all of these reasons, it is hereby urged that the conviction herein should be reviewed.

Respectfully submitted,

JAMES R. WILLIS, ESQ.
Attorney for Petitioner
1212 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
216/523-1100

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was mailed to the office of Ronald L. Collins, Prosecuting Attorney, Tuscarawas County, County Courthouse, New Philadelphia, Ohio 44663, this 26th day of June, 1975.

JAMES R. WILLIS, ESQ.
Attorney for Petitioner

SC76

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

*19*75 *TERM*

To wit: April 25, 1975

State of Ohio,
Appellee,

vs.

Jefferson Doyle,
Appellant.

No. 75-177

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

for TUSCARAWAS *County*

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by James R. Willis

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this.....day of..... 19.....

.....*Clerk*

.....*Deputy*

R YOUR
MATION
LY FILED

BARRETT PRINTING, PUBLISHERS, SPRINGFIELD, OHIO

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus.

*19*75 *TERM*

To wit: April 25, 1975

State of Ohio,
Appellee,

vs.

Jefferson Doyle,
Appellant.

No. 75-177

APPEAL FROM THE COURT OF APPEALS

for TUSCARAWAS *County*

This cause, here on appeal as of right from the Court of Appeals for TUSCARAWAS *County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.*

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for TUSCARAWAS *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this.....day of..... 19.....

.....*Clerk*

.....*Deputy*

YOUR
TION
G

APPENDIX "C"

IN THE COURT OF APPEALS, FIFTH DISTRICT

TUSCARAWAS COUNTY

STATE OF OHIO : JUDGES:
Hon. Norman Putman, P.J.
Plaintiff-Appellee : Hon. Leland Rutherford, J.
Hon. Paul Van Nostran, J.
vs. :
JEFFERSON DOYLE : CASE NO. CA 1108
Defendant-Appellant: M E M O
: Decided_____

APPEARANCES:

RONALD L. COLLINS
Prosecuting Attorney
Court House
New Philadelphia, Ohio 44663
Counsel for Plaintiff-Appellee

JAMES R. WILLIS
1212 Bond Court Bldg.
1300 East Ninth Street
Cleveland, Ohio 44114
Counsel for Defendant-Appellant

PUTMAN, P.J.

This is an appeal in a criminal action from a sentence for illegal sale of marijuana in violation of R.C. 3719.44(D). Appellant was jointly indicted with Richard Wood but tried separately. Wood's appeal is our separate case number 1109.

Twelve errors are assigned as follows:

1. The court erred in denying the appellant the opportunity to show that certain electors were improperly excluded in connection with jury service.

2. The court erred in failing to grant a change of venue.

3. The court erred in restricting the cross examination of the witness Bonnell as to his possible drug addiction.

4. The court erred in permitting the State, under the guise of refreshing the witness Griffin's recollection, to show a significant segment of an unsigned written report made by another and different officer.

5. The court erred in permitting the prosecution to interrogate the witness Wood in a manner suggesting his (--i.e.,Wood's) failure to disclose the substance of his testimony, or to otherwise "protest his innocence", at the time of his arrest was a factor that could properly be considered by the jury in determining his credibility as a witness.

6. The court erred in permitting the prosecution to develope through the testimony of both the witness Wood and the appellant, that they refused to consent to the search of the car.

7. The court erred in permitting the prosecution to develope, through the cross examination of the appellant, that he did not "protest his innocence" upon being arrested.

8. The prosecutor was guilty of misconduct in arguing to the jury that the failure of the appellant to protest his innocence, or to otherwise disclose his defense earlier than at the trial of Richard Wood, and that his failure to consent to a search of the vehicle, were circumstances that could be weighed arriving at a verdict in this case.

9. The court erred in failing to give, or appropriately incorporate into its general charge, the special requests submitted by the appellant.

10. The court erred in denying the various motions (including, but not limited to the motion for judgment of acquittal) made at the close of all the evidence.

11. The verdict of the jury is against the manifest weight of the evidence and is contrary to law.

12. The prosecutor was guilty of misconduct in arguing to the jury his personal opinion as to the guilt of the appellant.

We find the State's evidence, if believed, was sufficient to show beyond a reasonable doubt the following as set forth in appellee's brief:

In April of 1973, William Bonnell, an informant of the Multi-County Narco Bureau and a convicted mine

rioter free on bond pending various appeals, made contact with a man by the name of Vincent Cercone, who told Bonnell he could set up or help set up a transaction for a large quantity of marijuana (as it turned out, 10 pounds). On the evening of the 28th of April, 1973, Mr. Bonnell got a telephone call from Jefferson M. Doyle proposing to sell Bonnell 10 pounds of marijuana for $175 a pound, or a total of $1750. Arrangements were made to meet in the Cloverleaf Tavern in Dover, Ohio. Bonnell reported this telephone conversation to the Multi-County Narco Bureau which then tried to gather $1750, but only succeeded in raising $1320. This money was photocopied so it could be traced. Bonnell then proceeded in his pickup truck to the point where he had prearranged to meet with Mr. Doyle. From and after the time Mr. Bonnell met Mr. Doyle and also Mr. Richard Wood in Dover, he was at that time and from then on under constant surveillance by an agent from the Multi-County Narco Bureau, Kenneth Beamer, Agent in charge of Multi-County Narco Bureau, Captain Jack Griffin of the Dover Police Department, Chief Deputy Hobert White of the

34

Tuscarawas County Sheriff's Department and several others.

At approximately 12:30 to 1:00 A.M., Mr. Bonnell was seen by the agents and deputies conducting the surveillance, leaving the Cloverleaf Tavern and going across the street to Nickie's Tavern. Mr. Bonnell was then seen leaving this tavern in the company of Richard Wood. Mr. Doyle was at this time going to pick up the marijuana which was stashed in a culvert on Route 39. Bonnell and Wood got in Bonnell's truck and proceeded across Tuscarawas Avenue to New Philadelphia, Ohio. They parked the pickup truck on North Broadway just north of Beech Lane, near the Club 224 on North Broadway in New Philadelphia.

A very short time later the officers who conducted the surveillance observed a 1973 Oldsmobile Cutlass, driven by Jefferson Doyle, pulled up beside or to the rear of the Bonnell pickup truck. Mr. Doyle flashed his lights. The pickup truck proceeded into the rear of the parking lot of the 224 Club and both vehicles then were in the 224 Club parking lot. Captain Griffin, one of the officers conducting the surveillance,

observed Mr. Bonnell receiving a large brown paper bag through the window from Mr. Doyle and saw Mr. Wood get out of the pickup truck and get in the car with Doyle. At this time the parties separated and both vehicles turned right on Second Drive and proceeded North. The surveillance was continued and Doyle and Wood were followed on their route through New Philadelphia. A few minutes later Mr. Doyle and Mr. Wood were arrested for the sale of marijuana to Mr. Bonnell by Agent Beamer of the Multi-County Narco Bureau. In the meantime Mr. Bonnell had surrendered himself and the brown paper bag to the authorities. It was found to contain ten (10) pounds of cannabis sativa L. (marijuana).

After Doyle and Wood were arrested, Agent Beamer contacted Mr. Arthur B. Cunningham, Prosecuting Attorney of Tuscarawas County, for aid in preparing an affidavit for a search warrant, which warrant was approved by Judge Raymond C. Rice. This warrant was served and executed upon Doyle and Wood. Mr. Beamer, in the presence of Doyle

36

and Wood, went to the place where the 1973 Cutlass had been stopped and under guard until the warrant was obtained, and searched the automobile. Mr. Beamer discovered, under the floor mat on the passenger's side of the car, a wad of money. The money was immediately examined by Mr. Beamer and checked against the list of money he had previously copied and he noted that it was the same money he had earlier given to Mr. Bonnell.

We consider each assigned error in turn.

1.

No "refusal to allow exploration into" the system of jury selection appears in the record. Appellant's counsel did not ask to "explore" or produce evidence. He made a brief legal argument respecting certain journal entries and concluded saying (R. 8):

"Thats all we have on that motion Your Honor."

2.

There is no error demonstrated respecting a failure to change venue. There is no record of the voir

dire examination of prospective jurors. The record says simply (R. 122 A):

"Thereupon a jury was duly impaneled and sworn."

This recital is conclusive upon us in the absence of an affirmative showing to the contrary. None has been made.

3.

Cross examination of the witness Bonnell respecting his possible drug addiction was not erroneously restricted. Appellant was represented by skilled counsel who abandoned this subject before he really ever got started upon it, after a few questions about past use of benzedrene. The court asked counsel to show relevance whereupon the inquiry was suddenly dropped. (R. 178, 179).

(By Mr. Willis)

Q. You used drugs, didn't you?

MR. CUNNINGHAM: Objection, Your Honor.

THE COURT: Sustained.

Q. Mr. Bonnell, in your life have you ever used narcotics?

MR. CUNNINGHAM: Objection.

THE COURT: Sustained.

Q. You know what narcotics is, don't you?

A. Yes.

Q. Now specifically referring to benzedrine, do you know what that is?

MR. CUNNINGHAM: Objection, Your Honor, we are talking about 10 lbs. of marijuana.

MR. WILLIS: We are talking about his credibility too.

THE COURT: Objection will be sustained.

Q. Did you ever testify that you use narcotics, Mr. Bonnell?

MR. CUNNINGHAM: Objection!

Q. Isn't it a fact that you testified that you used --

MR. CUNNINGHAM: Objection!

MR. WILLIS: (Continuing) Benzedrine?

MR. CUNNINGHAM: Object!

THE COURT: It appears irrelevant unless it can be shown otherwise the objection will be sustained. (R. 178).

The State's witness Captain Griffin, when cross examined by appellant's counsel respecting his surveillance of the "sale" (R. 362-3):

Q. Now, when you finally came to a stop, you said you saw the informant standing with a package under his arm?

A. Yes.

Q. Did you see where the package came from?

A. He was standing on the passenger side, -- driver's side of the automobile, and -- no, he came from the car but I couldn't see.

Thereafter, upon re-direct, (R. 371) the prosecutor asked him about a report (State's Exhibit 11) which Griffin then identified as the report of the transaction prepared by himself and Hobert White (R. 371 lines 6 & 7) and testified, in substance, that he said in the report what he had just said on the witness stand.

We find this was justified by the challenging manner of the cross examination. No error appears. See Harris v. New York, 401 U.S. 222 (1971).

40

5.

Although Richard Wood was not on trial here, he testified as a defense witness for appellant Doyle. He gave a detailed narrative calculated to exculpate Doyle. He was cross examined by the prosecutor in such a manner as to demonstrate he had not told this story at his first or other earlier opportunities.

We find no error. This is proper cross examination bearing upon the credibility of the witness.

6.

Both appellant Doyle, after he testified on direct as a witness for himself in his own case in chief, and his co-defendant Wood who (although not then on trial) appeared as a defense witness, were cross examined in such a way as to develop the fact that upon first confrontation with the authorities they did not consent to a search of the car.

This was not a subject adduced by the state in its case in chief offered as substantive evidence of guilt but rather cross examination of a witness bearing upon the limited purpose of credibility. Concededly this could not have been shown in the states case in chief but used as it was on this state of the record for this limited purpose, it was not error.

7.

After the defendant-appellant took the stand and testified in detail as to a narrative of events he claimed to be exculpating, he was cross-examined by the prosecutor, in substance, as to why he did not give this same account when first confronted by the authorities (R. 504 - 508).

This was not evidence offered by the state in its case in chief as confession by silence or as substantive evidence of guilt but rather cross examination of a witness as to why he had not told the same story earlier at his first opportunity.

We find no error in this. It goes to credibility of the witness.

8.

This assignment goes to the fact that the

prosecutor argued to the jury the facts he developed on the cross-examination of the defendant Doyle and his witness Richard Wood which have been discussed in assignments 5, 6 and 7.

There we held the matters were not improperly shown and here we hold they were not improperly argued to the jury.

9.

The ninth assignment of error complains of the refusal of the trial court to give the jury a "cautionary" instruction respecting the testimony of the witness Bonnell, a claimed participant in the illegal sale.

We find no error. In State v. Flonnory,(1972) 31 O.S. 2d. 124, the fourth paragraph of the syllabus reads:

> "4. An instruction to the jury in a criminal case that the testimony of an accomplice is to be "acted upon with the extreme caution" is improper as constituting a comment upon the evidence."

We hold that rule governs here.

10. and 11.

From a careful reading of the record, we find the judgment is not against the manifest weight of the evidence and not contrary to law.

The state's chemist testified that the substance sold was "Cannabis Sativa" commonly knows as marijuana. Appellant argues the state loses unless the witness says the magic letter "L" thereafter, sic, "Cannabis Sativa L". This argument is not well taken. It is clear that the legislature intended by the use of the capital letter "L" after the words "cannabis sativa" to indicate the system of botanical classification.

12.

It is not true in fact that the prosecution at R. 527 or elsewhere, expressed a personal opinion upon the issue of innocence or guilt, or upon the credibility of any witness, nor did he otherwise by his argument, put his own credibility or prestige in the community into the balance.

For the foregoing reasons all twelve assigned errors are overruled, the judgment of the Court of Common Pleas of Tuscarawas County is affirmed and this cause is remanded to that court for the execution of sentence.

Rutherford, J. and Van Nostran, J. concur.

Norman J Van Nostran

Paul R. Van Nostran

Leland Rutherford

JUDGES.

IN THE COURT OF APPEALS, FIFTH DISTRICT

TUSCARAWAS COUNTY

STATE OF OHIO	:	
Plaintiff-Appellee	:	JUDGMENT ENTRY
vs.	:	CASE NO. CA 1108
JEFFERSON DOYLE	:	
Defendant-Appellant	:	
	:	

For the reasons stated in the memorandum on file, all twelve assigned errors are overruled. The judgment of the Court of Common Pleas of Tuscarawas County is affirmed and this cause is remanded to that court for the execution of sentence.

Norman J Van Nostran

Paul R. Van Nostran

Leland Rutherford

IN THE COURT OF COMMON PLEAS OF TUSCARAWAS COUNTY, OHIO

CASE NO. 10656

JUDGMENT ENTRY ON VERDICT AND SENTENCING

(Filed October 16, 1973)

On the 10th day of October, 1973, this cause came on for trial by Jury and the defendant was present in Court throughout said trial, represented by his Attorneys, James Willis of Cleveland, Ohio, and John James of Akron, Ohio. Prosecuting Attorney Arthur B. Cunningham represented the State of Ohio. Said trial began on the 10th day of October, 1973, and continued through the 15th day of October, 1973.

The Jury, having been duly impaneled and sworn, and having heard the opening remarks of the Prosecuting Attorney for the State of Ohio, and those of Attorney Willis, counsel for the Defendant, the testimony and evidence adduced and submitted by the parties hereto, including exhibits, the arguments of the Prosecuting Attorney and counsel for the defendant, and the charge of the Court, and after due deliberation thereon, finds that said defendant, Jefferson M. Doyle, is guilty of sale of an hallucinogen, as set forth in the Indictment filed against him.

The Court thereupon inquired of either party if there was a request that the Jury be polled as to its verdict, and the defendant having requested that the Jury be polled, each of said jurors was polled as to whether or not this was his or her verdict and said verdict was thereupon confirmed. It is so ordered.

The matter then came on for sentencing. Whereupon the Court inquired of the defendant whether or not he had anything to say why judgment should not be pronounced against him and the defendant having nothing further to say than what he had already said, and the Court having heard the remarks of the Prosecuting Attorney and those of counsel for the defendant, did then and does hereby Order, Adjudge and Decree that the Defendant be sentenced to the Ohio State Penitentiary for a period of not less than twenty nor more than forty (20-40) years, and to remain incarcerated therein until pardoned, paroled or otherwise released according to law.

It is further ordered that the defendant pay the costs herein, taxed at $_____.

It is furthered ordered that a warrant be issued to the Sheriff of this County to convey said defendant to the Ohio State Penitentiary, as provided by law, and that the defendant is hereby remanded to the custody of the Sheriff in accordance with the terms hereof.

/S/ Raymond C. Rice
Judge, Common Pleas Court

APPENDIX "E"

IN THE COURT OF APPEALS, FIFTH DISTRICT

TUSCARAWAS COUNTY

STATE OF OHIO : JUDGES:
Hon. Norman Putman, P.J.
Plaintiff-Appellee : Hon. Leland Rutherford, J.
Hon. Paul Van Nostran, J.
vs. :
CASE NO. CA 1109
RICHARD WOOD :
_M_E_M_O_
Defendant-Appellant :
Decided_____
:

APPEARANCES:

RONALD L. COLLINS
Prosecuting Attorney
Court house
New Philadelphia, Ohio 44663
Counsel for Plaintiff-Appellee

JAMES R. WILLIS
1212 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
Counsel for Defendant-Appellant

PUTMAN, P.J.

This appeal is a companion case to No. 1108, Ohio v. Doyle. By agreement of all counsel, both were argued and considered together for the reason that they arise out of a joint indictment and a single transaction and although each appellant had a separate trial, both appellants were represented at trial and here by the same skillful and experienced counsel.

Eleven errors are assigned as hereafter set forth. Because all except Nos. #4 and #7 are the same as in the Doyle case (No. 1108) we set forth for the purpose of convenience the appropriate number given the assignment of error in Doyle.

1. The court erred in failing to grant a change of venue. (Doyle No. 2)

2. The court erred in permitting the State, under the guise of refreshing the witness Griffin's recollection, to show a significant segment of an unsigned written report made by another and different officer. (Doyle No. 4)

3. The court erred in permitting the prosecutor to interrogate the witness Doyle in a manner suggesting his (Doyle's) failure to disclose the substance of his testimony, or to otherwise "protest his innocence," at the time of his arrest was a factor that could properly be considered by the jury in determining his credibility. (Doyle No. 5)

4. The court erred in permitting the prosecution to develope through the testimony of the witness Beamer that the defendant refused to consent to the search of the car.

5. The court erred in permitting the prosecution to develope, through his cross-examination of the defendant, that he did not "protest his innocence" upon being arrested. (Doyle No. 7)

6. The court erred in permitting the prosecution to develope, through the cross-examination of the appellant, that he did not "protest his innocence" upon being arrested. (Doyle No. 7) (Notice this is a repeat)

7. The court erred and the appellant was deprived of a fair trial as a consequence of the following circumstances: Pursuant to Rule 16, the prosecutor informed the defense that no statements (admissions or confessions) were made by either the witness Doyle or the appellant. Despite the apparent reliance of the defense on the prosecutor's response, and in spite of his continuing duty to disclose, the Court allowed the State to show that certain crucial admissions werein fact made.

8. The prosecutor was guilty of misconduct in arguing to the jury that the failure of the witness Doyle, and the appellant, to protest their innocence, or to otherwise disclose their defense, earlier than at the trial, and that their failure to consent to a search of the vehicle, were circumstances that could be weighed in arriving at a verdict in this case (Doyle No. 8)

9. The court erred in failing to give, or appropriately incorporate into its general charge, the special request submitted by the appellant. (Doyle No. 9)

10. The court erred in denying the various motions (including, but not limited to the motion for judgment of acquittal) made at the close of all the evidence. (Doyle No. 10)

11. The verdict of the jury is against the manifest weight of the evidence and is contrary to law. (Doyle No. 11).

Our memorandum in the case of Ohio vs. Doyle, Tuscarawas County No. 1108, is incorporated herein by reference and made a part hereof as fully as if rewritten herein in full. Appellant's counsel concedes the state's case in chief was substantially the same in both cases. Counsel concedes and we find that both trials were conducted substantially the same even though Doyle was tried before Judge Rice and Wood was tried before Judge Spies. We move now to consider each assigned error in turn.

1.

No error appears respecting the refusal of the trial court to change venue. No record of the voir dire examination of jurors was presented us. The record we do have recites merely (R. 11) that:

> "Thereupon a jury was duly impaneled and sworn."

Nothing to the contrary appears.

2.

We find no error in the use by the prosecuting attorney of the report prepared by Capt. Griffin and another, to refresh the recollection of Capt. Griffin upon re-direct examination, taking into consideration the nature of the cross-examination. (R. 272 - 289 of the Wood case)

3.

Here Doyle, not on trial, was called by Wood in the defense case in chief. The cross-examination was not improper for the same reasons stated in the Doyle memorandum respecting assignment No. 5 in the Doyle case.

4.

Here the state called the witness Beamer in rebuttal to rebut statements made by the witness Jefferson Doyle when cross-examined by the prosecutor. Doyle (not on trial) was testifying in defense of Wood having been called by the defense. Doyle volunteered in cross-examination by the prosecutor, details of a conversation between Doyle and Beamer at the time of his first confrontation with the authorities, at the time of the transaction in question, the night both Doyle and Wood were arrested. (R. 425 - 429)

This trial of Wood took place in October of 1973 after the Doyle trial had been conpleted in July of 1973.

No similar incident respecting a clash between the testimony of Doyle and Beamer had developed in the Doyle trial.

We find the testimony of Beamer was proper rebuttal to the testimony of Doyle, and that a proper foundation for the same was laid in cross-examination.

The court held a hearing outside the presence of the jury and found the rebuttal proper. (R. 487). A proper instruction limiting the use of the testimony to the purpose of impeachment of the witness was given (R. 488).

The court properly found the prosecutor had not violated Criminal Rule 16 by not informing the defense of this rebuttal evidence before trial (R. 487).

5.

This assignment raises the same legal point as assignment No. 7 in the Doyle case and is overruled for the reasons given there. This was not evidence used in the state's case in chief but cross-examination for the purpose of affecting credibility.

6.

This assignment is an apparent inadvertent repeat of No. 5 above.

7.

This assignment is preculiar to this case and

did not arise in Doyle's case. The appellant here complains that the prosecutor under Criminal Rule 16, said in writing, August 31, 1973,

> "Defendant made no statements at the time of arrest."

The trial of the case commenced in October, 1973. After the defendant Wood, and co-defendant, not on trial, Doyle, testified for the defense, the prosecutor recalled Kenneth Beamer, who had participated in the investigation and arrest of the defendants. He testified (R. 486-494):

> Q ... At any point subsequent to the time you placed Doyle or Mr. Wood under arrest, did you have an opportunity to have a conversation with Mr. Doyle?
>
> A. Yes, sir.
>
> Q. And when did you have such conversation?
>
> A. After the search of the vehicle some time after 6:00 a.m. in the morning I took him back to the county jail. He rode in my car.
>
> Q. Jefferson Doyle?
>
> A. Yes.
>
> Q. And what was the circumstances of that conversation?

MR. WILLIS: Objection.

THE COURT: You may answer.

A. I stated to Mr. Doyle on the way back, I said Jeff, what are you doing in the dope business, and he said, I don't know, Kenny, I don't know. I stated that I had heard there may be more out on Route 39 in a ditch or culvert...

. . . . . .

A. I said if you have more, Jeff, I want it - I want it all. He said there isn't any more. That is all we had with us.

. . . . . .

Q. So it is fair to say, is it not, Mr. Beamer, that he didn't protest his innocence?

MR. WILLIS: Objection.

THE COURT: He may answer.

A. That is correct, sir.

Q. All right, now, referring your attention specifically to Richard Wood, to this defendant did you have an conversation with the defendant Richard Wood?

MR. WILLIS: Objection.

THE COURT: Overruled.

A. Yes.

Q. And Kenny, did you have an opportunity to have any conversation with the defendant, Richard Wood, at that time and place?

A. Yes sir.

Q. When was that?

A. Just moments after we all arrived at the Tuscarawas County Jail.

Q. Advise us what the nature or circumstances of that conversation was.

MR. WILLIS: Objection.

THE COURT: Overruled.

. . . . . .

THE COURT: He asked you when or if you had any further conversations.

A. Yes.

Q. At the same time?

A. Yes.

Q. What was the nature or circumstances of that conversation?

A. I asked Mr. Wood if he would sign a consent to search his vehicle.

MR. WILLIS: Object and more the answer be stricken and the jury instructed to disregard it.

THE COURT: Now I think this witness has testified to that - permission was not given.

MR. WILLIS: I asked that the jury be instructed that no person is required to give consent and no inference can be drawn from that.

THE COURT: The court will instruct the jury that consent was not given nor is there any reasponsibility that consent should be given under the factual set up in this case.

Q. At any time, Mr. Beamer, did Mr. Richard C. Wood protest his innocence to you?

MR. WILLIS: Objection.

THE COURT: Overruled. You may answer yes or no.

A. No, sir.

Q. Kenny, at any time did Mr. Wood indicate to you that he had or felt he was framed or set up?

MR. WILLIS: Objection.

THE COURT: Overruled.

A. No, sir.

. . . . . .

Q. At any time after the time he was placed under arrest thru the period of the subsequent investigation that morning did Mr. Richard Wood tell you that he was innocent - that he had been set up or framed, or both?

THE prosecutor: Not for that entire period of time.

THE COURT: You may answer yes or no.

A. No, sir he did not. (R. 486-494).

Agent Beamer testified he had not written a summary of his conversation with Doyle and he had not told the prosecutor of his oral statement at the time defendant-appellant requested discovery (R. 496-497) and he further added he only told the prosecutor of the statement on the day before he testified as a rebuttal witness, Thursday, October 4, 1973, the third day of the trial, after he had already testified as a state witness in its case in chief.

We find no showing that the prosecutor was aware of this oral statement to Agent Beamer before the trial of the case. (R. 515-516).

8.

We find the prosecutor was not guilty of misconduct in arguing to the jury the issue of credibility of the witness Doyle and the witness defendant Wood

and pointing to their failure to assert their narratives at the earliest opportunity.

The same reasons apply here as in the eighth assignment in the Doyle case.

9.

The cautionary instruction respecting the testimony of the state's witness Beamer was properly refused. State v. Flonnory, 31 O.S. 2d. 124, paragraph 4 of the syllabus.

10. & 11.

We find from a careful reading of the record that the judgment is not against the manifest weight of the evidence and not contrary to law.

For the foregoing reasons all eleven assigned errors are overruled, the judgment of the Court of Common Pleas of Tuscarawas County is affirmed and this cause is remanded to that court for execution of sentence.

Rutherford, J. and Van Nostran, J. concur.

Norman J. Putman

Paul E. Van Nostran

Leland Rutherford

JUDGES

IN THE COURT OF APPEALS, FIFTH DISTRICT

TUSCARAWAS COUNTY

STATE OF OHIO	:	
Plaintiff-Appellee	:	JUDGMENT ENTRY
vs.	:	CASE NO. CA 1109
RICHARD WOOD	:	
Defendant-Appellant	:	

For the reasons stated in the memorandum on file, all eleven assigned errors are overruled. The judgment of the Court of Common Pleas of Tuscarawas County is affirmed and this cause is remanded to that court for execution of sentence.

Norman J. Putman

Paul E. Van Nostran

Leland Rutherford

JUDGES.

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-5014 and 75-5015

JEFFERSON DOYLE,

Petitioner,

—*v.*—

STATE OF OHIO,

Respondent;

and

RICHARD WOOD,

Petitioner,

—*v.*—

STATE OF OHIO,

Respondent.

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, TUSCARAWAS COUNTY

PETITIONS FOR CERTIORARI FILED JULY 2, 1975
CERTIORARI GRANTED OCTOBER 6, 1975

In the Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-5014 and 75-5015

JEFFERSON DOYLE,
Petitioner,
—*v.*—
STATE OF OHIO,
Respondent;
and
RICHARD WOOD,
Petitioner,
—*v.*—
STATE OF OHIO,
Respondent.

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, TUSCARAWAS COUNTY

TABLE OF CONTENTS

CHRONOLOGICAL LIST OF RELEVANT DATES

State of Ohio v. *Jefferson Doyle*, Common Pleas Court, Tuscarawas County, Ohio, Case No. 10656:

June 7, 1973—Indictment filed.

July 18, 1973—Not guilty plea entered.

October 10, 1973—Trial commenced.

October 15, 1973—Guilty verdict returned.

October 16, 1973—Judgment Entry on verdict and sentencing.

January 6, 1975—Conviction affirmed by Court of Appeals.

May 9, 1975—Appeal dismissed by Supreme Court of Ohio.

State of Ohio v. *Richard Wood*, Common Pleas Court, Tuscarawas County, Ohio, Case No. 10657:

June 7, 1973—Indictment filed.

July 18, 1973—Not guilty plea entered.

October 2, 1973—Trial commenced.

October 9, 1973—Guilty verdict returned.

October 29, 1973—Judgment Entry on sentence.

January 6, 1975—Conviction affirmed by Court of Appeals.

April 25, 1975—Appeal dismissed by Supreme Court of Ohio.

INDICTMENT

(Filed June 7, 1973)

(General Form)

Rev. Code, Sec. 2941.06.

THE STATE OF OHIO,)
) ss. COURT OF COMMON PLEAS
TUSCARAWAS COUNTY,)

Of the Term of April in the Year of Our Lord One Thousand Nine Hundred and Seventy-Three

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that JEFFERSON M. DOYLE on or about the 29th day of April, 1973, at the County of Tuscarawas aforesaid, did unlawfully sell an hallucinogen, to-wit: Cannabis, commonly known as Marijuana, to another person, said sale not being exempted by the provisions of Section 3719.40 to 3719.49, inclusive, of the Revised Code of Ohio, and said sale being contrary to and in violation of Section 3719.44, Sub-Section (D) of the Revised Code of Ohio, and against the peace and dignity of the State of Ohio.

/s/ [Illegible]
Prosecuting Attorney

INDICTMENT

(Filed June 7, 1973)

(General Form)

Rev. Code, Sec. 2941.06.

THE STATE OF OHIO,)
) ss. COURT OF COMMON PLEAS
TUSCARAWAS COUNTY,)

Of the Term of April in the Year of Our Lord One Thousand Nine Hundred and Seventy-Three

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that RICHARD C. WOOD on or about the 29th day of April, 1973, at the County of Tuscarawas aforesaid, did unlawfully sell an hallucinogen, to-wit: Cannabis, commonly known as Marijuana, to another person, said sale not being exempted by the provisions of Section 3719.40 to 3719.49, inclusive, of the Revised Code of Ohio, and said sale being contrary to and in violation of Section 3719.44, Sub-Section (D) of the Revised Code of Ohio, and against the peace and dignity of the State of Ohio.

/s/ [Illegible]
Prosecuting Attorney

SELECTED SEGMENTS OF THE TRANSCRIPT OF PROCEEDINGS IN THE STATE OF OHIO V. JEFFERSON DOYLE (Case No. 10656) TRIAL:

• • • •

PROSECUTOR'S DIRECT EXAMINATION OF KENNETH BEAMER

[268] Q You gave the "Stop Order" on this vehicle you described?

A Yes Sir.

• • • •

[269] Q What did you do from there?

A Got in my vehicle; came back to the location in which the automobile had been stopped. I got out of my car and at that time seen at that time, inside the car on the passenger side was a Richard C. Wood, who I know and also Jefferson Doyle who I know and apprehended.

Q Were you able to ascertain who was driving the vehicle at that time?

A I don't believe at that time, I knew who was driving.

Q All right,—and what happened from there?

A At that time I placed Mr. Doyle and Mr. Wood under arrest. I told them that they were under arrest for selling of Hallucinogens. I gave them their rights at this time and they were taken to the Tuscarawas County Sheriff's Office to the jail, by Patrolman Hutchison of New Philadelphia Police Department.

Q All right. You gave them their rights. Is that what is known as the "Miranda Warning"?

A Yes Sir. It is.

Q Did you do anything in regard to a Search of their vehicle?

[270] A Yes Sir. I did.

Q Tell the Court and Jury, please, what steps you took?

A BY MR. WILLIS: Objection.

BY THE COURT: Overruled.

BY MR. BEAMER:

A I prepared, with help,—I prepared an Affidavit for a Search Warrant of the 1973 Olds in which Mr. Doyle and Mr. Wood was riding and that at approximately 6:00 A.M. in the morning we searched that vehicle.

Q You say you prepared an Affidavit for a Search Warrant?

A Yes, we did.

Q Were you successful in obtaining a warrant?

BY MR. WILLIS: Objection.

BY THE COURT: Overruled.

BY MR. BEAMER:

A Yes Sir. I was.

Q Who approved your warrant for you?

BY MR. WILLIS: Objection!

BY THE COURT: Overruled.

BY MR. BEAMER:

A Judge Raymond C. Rice of the Common Pleas Court signed the Affidavit and the Warrant for Search.

Q All right. Was the Warrant then,—well, did you serve the warrant or give the warrant to Mr. Doyle or Mr. Wood?

[271] A I served a copy of the warrant on Mr. Wood and Mr. Doyle.

At this time, they were taken back to the site where the car was stopped and the car at that time, had been blocked. The keys were in Mr. Doyle's possession.

• • • •

[273] Q And you then executed on a warrant?

A Yes Sir.

Q By the way, had you asked Mr. Doyle or Mr. Wood permission to search the car?

BY MR. WILLIS: Objection.

BY THE COURT: Overruled.

BY MR. BEAMER:

A Prior to getting a warrant. Yes Sir.
Q Did they permit you to search the car?
[274] BY MR. WILLIS: Objection!
BY THE COURT: Overruled.

BY MR. BEAMER:

A Yes Sir.
Q Prior to getting a warrant?
A They would not allow me to search it. No sir.
Q All right. So you proceeded to get a warrant and execute on it?
A Yes Sir.

* * * *

CROSS EXAMINATION OF RICHARD WOOD

(As a defense witness in the Doyle trial)

[454] Q You hadn't seen any official or police vehicles in the vicinity during this period of time when you were chasing Bonnell to give him his money back?
A No Sir.
Q So here was a complete surprise to you, when you were arrested and that's why you balled the money up and put it under the mat in the right front seat of the car?
A That's why I what, Sir? I beg your Pardon? I didn't understand your question.
Q Well—you did, didn't you,—ball the money up and put it under the mat on the passenger side of the vehicle?
A Yes Sir.
Q Well, did you do that before or after you were arrested?
A Before, Sir.
Q Did you do that before or after you saw the first official police vehicle, recognizable police vehicle?
A Before, Sir.
Q Why would you do that?
A I didn't know what to do with it.

Q What were you guilty of?
A Nothing, Sir.
Q What were you hiding the money for, then?
What were you going to do with it?
A I don't know.
Q Are you innocent, or—were you innocent?
[455] A Yes Sir.
Q Why did you hide the money? Did Jeff tell you to hide it?
A No, I don't believe so.
Q Oh,—you decided that on your own?
A Well, it was about that big of a bundle (indicating).
You couldn't stick it in your pocket, so we stuck it under the mat.
Q Didn't know what to do with it. Was Jeff innocent?
A I think he is. Yes.
Q You were, certainly,—according to your testimony, so why hide the money?
What were you going to do with it?
A We figured we'd been set up.
Q What did you do with it when the police arrested you?
A I didn't do nothing. It was under the mat.
Q I know. You told the officers that Bill Bonnell had set you up?
BY MR. WILLIS: Objection.
BY THE COURT: Overruled.

BY MR. WOOD:

A No Sir.
Q You didn't tell them?
A No Sir. Not at that time.
Q You didn't tell them that Bill Bonnell had "set you up" or Jefferson Doyle up and you was chasing him around town [456] to give him the money back?
A Not at that time, Sir.
Q What did you tell them then?
BY MR. WILLIS: Objection.

BY MR. CUNNINGHAM: Strike that, please.
Q Remember the Preliminary Hearing in this case?
A Yes Sir. I remember having it.
Q Did you take the witness stand and tell the Judge in that case that you had been set up?
BY MR. WILLIS: Objection!
BY THE COURT: Overruled.

BY MR. WOOD:

A No Sir.
Q That was before the Preliminary—the Preliminary Hearing was before you were indicted in this case, was it not?
A I don't know. I presume so, Sir.
Q I am going to show you what has been marked as State's Exhibit 4 for identification purposes.
Now, does State's Exhibit #4 look familiar?
A Yes Sir.
Q That's the wad of money under the mat in the right front seat, is it not?
A Yes Sir.
Q Put there by you?
[457] A Yes Sir.
Q I'll show you what has been marked for identification as State's Exhibit 13 and ask you if you recognize what is depicted in that photograph?
A Yes Sir.
Q That your over-night bag?
A Yes Sir.
Q Is that all your money in the bottom?
A Yes Sir.
Q That's the over-night bag that was taken from the vehicle when it was searched by the officers that night?
A Yes.
Q No question about that being your bag?
A No Sir.
Q How about the money?
A No question about that either. It's got my razor and comb and stuff in it.

Q So upon your arrest, you didn't tell anybody you had been "set up" and why you were chasing Bonnell?
BY MR. WILLIS: Objection.
BY THE COURT: You may answer.

BY MR. WOOD:

A No Sir.
Q And you didn't testify in your own defense at the Preliminary Hearing prior to indictment in this case?
[458] A No Sir.
BY MR. WILLIS: Objection.
BY THE COURT: Overruled.

BY MR. CUNNINGHAM:

Q So the first time you testified as to the facts in this case was at your trial?
BY MR. WILLIS: Objection!
BY THE COURT: Overruled.

BY MR. WOOD:

A Yes Sir.
BY MR. CUNNINGHAM: That's all.

* * * *

CROSS EXAMINATION OF JEFFERSON DOYLE

(testifying in his own defense)

[502] Q All right. So then you proceeded on and were later arrested?
A Yes Sir.
Q Okay. Did you tell Mr. Wood to put the money under the mat?
A I don't recall, Sir, if I did or not. I said some things that night and I don't recall if I told him to put the money under [503] there or not, Sir. I really don't.
Q Anyway, did you see him put it under the mat?
A Yes Sir. I knew the money was under the mat.
Q And when was it put under the mat?
A I believe it was put under the mat, under there,—I'm not sure,—I'm not trying—I'm trying to tell the

truth. I don't know what Mr. Wood,—I'm not trying to deny anything by him,—I thought it was put under there as we were coming up Fair Avenue. I don't know if it was before or after the police car pulled up in front of us. I really don't know.

Q You don't know whether it was before you saw the police car or after you saw the police car?

A No, I don't. I don't know.

Q Does Mr. Wood often put his money under the mat?

A No, but at this time, I think that I was figuring out what was going on. I couldn't understand why Bill was running from me and why he did that.

Q Any way,—you were innocent?

A Yes Sir.

Q And Mr. Wood was innocent?

A Yes Sir.

Q So you hid the money under the mat?

A At that time, we didn't know what else to do.

Q Anyway, you were both innocent?

[504] A Yes Sir.

Q Of anything. You were chasing Bill Bonnell either to have him explain to you what happened or to give him his money back, and you are not sure of that, either?

A I was chasing him to find out what was going on. I didn't know why,—if I didn't know why he put the money in,—I didn't know for sure that he did. I never testified that he did. At that time, I didn't.

Q Anyway, it got there?

A Yes Sir.

He was there beside the window and I was talking to him and looking around. I don't know how it got there.

Q It certainly didn't get there because you sold him Marijuana and he gave you marked money?

A Absolutely not, Sir.

Q All right, so—absolutely not. You are innocent?

A I am innocent. Yes Sir.

Q That's why you told the police department and Kenneth Beamer when they arrived—

BY MR. WILLIS: Objection.

BY MR. CUNNINGHAM:

(continuing)—about your innocence?

BY MR. WILLIS: Objection!

BY THE COURT: Do you understand the question?

[505] BY MR. DOYLE:

A I believe I do, Your Honor. He is asking me if I told them that I was innocent when they arrived. Is that what you are asking me?

I didn't tell them about my innocence. No.

Q You said nothing at all about how you had been set up?

BY MR. WILLIS: Objection.

BY THE COURT: Overruled.

BY MR. CUNNINGHAM:

Q Did Mr. Wood?

A Not that I recall, Sir.

BY MR. WILLIS: Objection to that. Move the answer be stricken.

BY MR. DOYLE:

A I don't recall him saying anything.

BY THE COURT: It will be overruled.

BY MR. CUNNINGHAM:

Q Were you asked whether or not the officers involved could search your automobile?

BY MR. WILLIS: Objection.

BY THE COURT: Overruled.

BY MR. DOYLE:

A I don't remember because it wasn't my car at the time, you know.

Q Well, you didn't consent to a search, did you?

[506] A I wasn't asked. I'm sure of that.

Q Did Mr. Wood—Was Mr. Wood?

BY MR. WILLIS: Objection.

BY MR. DOYLE:

A I don't know if he was asked.
BY THE COURT: Objection is overruled.

BY MR. CUNNINGHAM:

Q In any event, a search warrant was obtained?
A Yes Sir.
Q As a matter of fact, if I recall your testimony correctly, you said instead of protesting your innocence, as you do today, you said in response to a question of Mr. Beamer,—"I don't know what you are talking about."
A I believe what I said,—"What's this all about?" If I remember, that's the only thing I said.
Q You testified on direct.
A If I did, then I didn't understand.
Q I was questioning, you know, what it was about. That's what I didn't know. I knew that I was trying to buy, which was wrong, but I didn't know what was going on. I didn't know that Bill Bonnell was trying to frame me, or what-have-you.
Q You were going to buy? Did you have something in the car?
A Beg pardon? Oh,—I didn't have nothing in the car. No.
[507] Q Did you have Marijuana in the car?
BY MR. WILLIS: Objection, Your Honor.

BY MR. DOYLE:

A No, I did not.
BY THE COURT: Overruled.

BY MR. CUNNINGHAM:

Q All right,—But you didn't protest your innocence at that time?
BY MR. WILLIS: Objection.
BY THE COURT: Overruled.

BY MR. DOYLE:

A Not until I knew what was going on.

Q All right. Do you remember the Preliminary Hearing in this case?
A Yes Sir. I remember it.
Q And that was prior to your indictment for this offense, was it not?
A Yes Sir. I believe,—Yes Sir, it was before I was indicted.
Q Arraignment. Is that what you mean?
A Yes. The next day after the arrest.
Q Yes, when evidence was presented and you had the opportunity to hear the testimony of the witnesses against you. Remember that?
A Yes Sir.
[508] Q Mr. Bonnell testified; Captain Griffin testified; Deputy—Chief Deputy White testified?
A Yes Sir.
Q Kenneth Beamer testified?
A Yes Sir.
Q You were there, weren't you?
A Yes Sir.
Q And your lawyer was there,—Mr. James?
A Yes Sir.
Q Tape recording was made of the transcript?
A Yes Sir.
Q Did you protest your innocence at that proceeding?
BY MR. WILLIS: Objection!
BY THE COURT: Overruled.

BY MR. DOYLE:

A I didn't—everything that was done with that was done with my attorney. My attorney did it.
Q All right. The first time that you gave this version of the fact was in the trial of Richard Wood,—was it not?
BY MR. WILLIS: Objection.
BY THE COURT: Overruled.

BY MR. DOYLE:

A Yes Sir. It was the first time I was asked.

Q All the time, you being innocent?
A Yes Sir.
[509] BY MR. CUNNINGHAM: That is all.
BY MR. WILLIS: Nothing further, Your Honor.

* * * *

PROSECUTOR'S OPENING SUMMATION IN THE DOYLE TRIAL

* * * *

[514] Keep in mind, the classic defense of any criminal law suit [515] is the prosecution, Ladies and Gentlemen, or everybody but the Defendant. Diffuse what the true facts are; obscure the facts and prosecute the prosecution.

A typical and classic defense, but keep in mind, when you are considering the testimony of the law enforcement officers involved, that not until, Ladies and Gentlemen, not until the trial of this case and prior to this case, the trial of Richard Wood's case, that anybody connected with the prosecution in this case had any idea what stories would be told by Jefferson Doyle and Richard Wood. Not the foggiest idea. Both of them told you on the witness stand that neither one of them said a word to the law enforcement officials on the scene—

BY MR. WILLIS: Objection!
BY THE COURT: Overruled.

BY MR. CUNNINGHAM:

(Continuing) on the scene at the point of their arrest, at the Preliminary Hearing before Indictment in this case. Not a word that they were innocent; that this was their position; that somehow, they had been "set-up".

So, when you evaluate the testimony of the Law Enforcement Officials, consider—

BY MR. WILLIS: Objection!
BY THE COURT: Overruled.

BY MR. CUNNINGHAM:

(Continuing) —what they had to deal with on the night [516] in question and the months subsequent to that.

It is another classic defense strategy to admit all approvable facts that there is a disinterested witness to or, let's say, a Law Enforcement witness, and deny the ultimate facts,—and that is what was done here. They admit being there. They admit talking and seeing Bonnell. Mr. Doyle even admits there was a brown paper bag. Naturally, he denies that he gave it to Mr. Bonnell. He reverses it, because at the time he gave his testimony in this Court in the Richard Wood case, a week ago, he knew exactly whatever witness involved in this case with the law enforcement point of view, the prosecution point of view was going to say.

He very simply fit his testimony to that of what the Law Enforcement witnesses were going to say, or knew they were going to say in this case. Denied the critical facts of Mr. Bonnell's testimony its' not sure about. A classic defense in that sense, as well.

Think about it, Ladies and Gentlemen, when you go to the Jury Room. Would Bill Bonnell,—would Bill Bonnell have, in advance, told and have had narcotics people, arranged to get the money, permitted himself to be staked out? Would he have taken such a chance as try to sell instead of buy, and would he have, when he knew that he was being under surveillance, staked out with narcotics money? [517] Would he have taken such a chance?

Ladies and Gentlemen, in your deliberations, consider it what it is. Unmitigated nonsense. Bill Bonnell has neither the brains nor the guts for all that he is, to pull off such a stunt as that. It simply isn't believable.

So,—evaluate it from the other side. Who is telling you this is the way it was,—that Bill Bonnell was "selling" instead of "buying"?

* * * *

DEFENSE COUNSEL'S CLOSING ARGUMENT [1]

* * * *

[17] Now, they say he didn't protest his innocence, as though that there was some reason why a person who is being arrested should do so. The law says that you don't have to try your case out on the public streets. You don't have to try your case in police stations. You don't have to make explanations anywhere except in court, if you feel it's necessary.

Now,—that's the law. That is absolutely the law. There is no obligation on a citizen to stand out on the street and try to explain something to a police officer. Why should he risk having whatever he said distorted? I am not saying it would be, but why should he risk it? He has to talk to a bunch of police officers and he's out on the street. Why should he stand out there and discuss it with them. When he comes to court, nine chances out of ten, it's going to come out different. The best thing is to get a lawyer.

Beamer said,—and this is significant. Beamer said he advised the man of his rights. He told him he had a right to get an attorney—he had the right of silence, which [18] means he didn't have to say anything whatsoever.

Having exercised the right of silence, that can't be utilized to penalize him in any way. In other words, if I don't want to make any statement at the time; I want to get an attorney and exercise my silence, I can't be penalized for that. You can't be penalized for a man—for exercising the constitutional right. Why give me a right and tell me I have a right to refuse to answer any questions, then penalize me for exercising it? Yet, that's precisely what the Prosecutor is doing here. He is arguing—why didn't they protest their innocence out

---

[1] Defense counsel's closing argument is not included in the main Transcript of Proceedings but was transcribed as a supplement thereto. Page reference [17] refers to the supplement captioned "Closing Argument of Mr. James Willis."

there on the street?" Why didn't you tell the police after you heard the Preliminary Hearing?

For what reason?

Any lawyer worth his salt—one of our most famous Justices has said,—"Any lawyer worth his salt will advise his client not to make any statement in any set of circumstances."

If Holmes can say that, I certainly think that we should feel that Mr. Doyle is certainly not as wise as Oliver Wendell Holmes, Jr.

He is not that wise. Here is a man on the Supreme Court thinks that is the way it ought to be handled. If this man comes to the same conclusion, why should we penalize him? Yet, the Prosecutor argued—"Why didn't he protest his innocence"? There is no reason for him to protest his innocence.

Now, if you break your leg, you hire a doctor. [19] If you get into some legal difficulty, you hire a lawyer. Anybody who tries to fix a broken leg himself is a fool, and anyone who gets in legal difficulty and tries to handle it himself is a fool, and even a lawyer,—it has been said, a lawyer who represents himself has a fool for a client, and that's true, and those of us who watch Watergate see these lawyers up here with lawyers; judges with lawyers, so that if you are going to hire a lawyer, it doesn't make sense not to follow his advice. That's the reason you go to him, so that when you had the Preliminary Hearing, the man had legal counsel.

The Prosecutor would penalize him because his lawyer wouldn't let him make some kind of speech there at the Preliminary Hearing.

The upshot of all this is, if he had made a speech, he wouldn't have altered the course. He was going to be indicted anyway, so what's the purpose of the speech?

Again, that is just something, I suppose, to argue about.

* * * *

PROSECUTOR'S CLOSING SUMMATION

[526] On the matter of protesting innocence. The right to remain silent is constitutionally right I think we all agree that it is probably a solid and good right that we all have.

The Fifth Amendment was given to us as a protection against the old futile [feudal] system of star-chambers extracting by force, a confession from a Defendant. We have the Fifth Amendment. I agree with it. It is fundamental to our sense and system of fairness, but if you are innocent—

BY MR. WILLIS: Objection!

THE COURT: Overruled.

BY MR. CUNNINGHAM:

(continuing) —if you are innocent, Ladies and Gentlemen, if you have been framed, if you have been set-on, etc. etc. etc., as we heard in Court these last days, you don't say, when the law enforcement officer says, —"You are under arrest",—you don't say,—"I don't know what you are talking about." You tell the truth. You tell them what happened and you go from there. You don't say,—"I don't know what you are talking about",—and demand to see your lawyer and refuse to permit a search of your vehicle, forcing the law enforcement agents to get a search warrant.

If you're innocent, you just don't do it. [527] Mr. Willis gave a very fine, very eloquent Final Argument, attacking the credibility of each and every one of my witnesses and even me. He justifies this on the basis of he is doing everything for his client. He is trying to demonstrate to you that we have not proved the case, "beyond a reasonable doubt". Talked about everything, Ladies and Gentlemen; talked about every witness, but he didn't talk at all,—he didn't talk at all,—he didn't even mention the money. Marked money. Found under the mat in the passenger side of the Doyle—the Wood vehicle, concealed.

Didn't even mention it, because this is, Ladies and Gentlemen, is all the corroboration, if any is necessary at all,—this is all the corroboration we need. They can't explain the money. So,—if you don't feel that we, representing the State of Ohio, proved our case "beyond a reasonable doubt", it is your duty to acquit this Defendant, but to do so, you are going to have to disbelieve Griffin, White, Beamer, me—

BY MR. WILLIS: Objection.

BY MR. CUNNINGHAM:

Ladies and Gentlemen, please, when you go into your very important deliberations in this case, don't be distracted by this periphery attack; these attacks on the witnesses. Don't be gullible. There is a classic [528] and very master-minded defense, but the facts are here and it is your duty to convict, because Mr. Jefferson Doyle is guilty, and I think we have proved it. Thank you, very much.

* * * *

SELECTED SEGMENTS OF THE TRANSCRIPT OF PROCEEDINGS IN THE STATE OF OHIO V. RICHARD WOOD (Case No. 10657) TRIAL:

* * * *

PROSECUTOR'S DIRECT EXAMINATION OF KENNETH BEAMER

[125] A I went back down to Ray Ave. in front of Metz Apartments [126] directly next to the New Philadelphia Post Office. I got out of the car and when I got out of the car, I recognized Mr. Doyle, Jefferson Doyle. I spoke to Jeff. He spoke to me. I looked in the car and recognized Mr. Wood. I said "Hi" to him and he said "Hi" back and I ordered him out of the car, at which time I placed Mr. Wood and Mr. Doyle both under arrest.

Q Did you hand cuff them?

A Yes.

Q Did you search them?
A I padded them down, yes, sir.
Q Read them their rights?
A Yes, sir.
Q What then happened?
A Mr. Wood and Mr. Doyle were taken to the Tuscarawas County jail by Patrolman Hutchinson of the New Philadelphia Police Department.
Q What rights did you read them?
A I told Mr. Wood and Mr. Doyle of the Miranda warning rights—they had the right to remain silent, anything they said could and would be used against them in a court of law, and they had the right to an attorney and didn't have to say anything without an attorney being present and if they couldn't afford one, the court would appoint them one at the proper time.
[127] Q You returned to the Tuscarawas County Sheriff's Department and took Mr. Doyle and Mr. Wood with you?
A Yes.
Q Is this the same Mr. Wood that is in court today?
A Yes, sir.
Q What happened from there?
A We had the car locked and the keys given back to Mr. Doyle I believe, as he was the driver of the vehicle at that time. The car was locked. Police officers were assigned to stay at the car. We went back to the Tuscarawas County jail, at which time I asked Mr. Wood—asked Mr. Doyle if he would consent to a search of the vehicle and he said . .
BY MR. WILLIS: Objection.
BY THE COURT: Sustained.
Q You said the car was locked up, and . .
A The keys given to Mr. Doyle, I believe.
Q Mr. Doyle?
A Yes, sir.
Q And the car was kept . .
A Kept under police guard.
Q By your instructions?
A Yes.

[128] Q So you discussed the matter of the vehicle with Mr. Doyle and Mr. Wood?
A Yes.
Q And you asked them to search the vehicle?
BY MR. WILLIS: Objection.
BY THE COURT: The court might not be exactly clear as to who "them" might be. Put another question.
Q Did you ask Mr. Wood if you could search the vehicle?
BY MR. WILLIS: Objection.
BY THE COURT: Answer yes or no.
A Yes.
Q What was his response?
BY MR. WILLIS: Objection.
BY THE COURT: He may answer.
A He would like to speak with his attorney first.
Q Did he do so?
A Yes, he did.
Q Did you ask the question of Mr. Doyle?
[129] BY MR. WILLIS: Objection.
BY THE COURT: You may answer.
A Yes.
Q What was his response?
BY MR. WILLIS: Objection.
BY THE COURT: Sustained.
Q He did then talk to his lawyer?
A Mr. Wood did, yes, sir.
Q Were you able to obtain his consent to search the vehicle?
BY MR. WILLIS: Objection.
BY THE COURT: Put a handle on "his".
Q Mr. Woods?
BY MR. WILLIS: Objection.
BY THE COURT: You may answer.
A Mr. Wood refused to consent to a search.
Q Did you discuss the vehicle with Mr. Wood?
A Yes.
[130] Q Did you discuss the question of ownership with Mr. Wood?
A Yes.

Q Were you able to ascertain who had leased it?
A Yes.
Q Who was that?
A Mr. Wood stated that he had leased the car.
Q So he would not consent. What did you do next?
BY MR. WILLIS: Objection.
BY THE COURT: You may answer.
A I started to draw up a search warrant—affidavit for a search warrant.

* * * *

DEFENSE COUNSEL'S CROSS EXAMINATION OF KENNETH BEAMER

[169] Q Mr. Beamer, isn't it a fact that you were the one who actually arrested Mr. Doyle and Mr. Wood?
A Yes, sir.

* * * *

CROSS EXAMINATION OF JEFFERSON DOYLE

(testifying as a defense witness in the Wood trial)

[423] Q So it was like the Key Stone Cops—you chasing Bonnell trying to get him to give his money back and Mr. Wood in the front seat looking at it and counting it?
A Not the way you are saying it.
Q How was it?
A The way it was I was trying to catch Mr. Bonnell to find out what the idea is.
Q You dirty dog I am going to give you your big pile of money back?
A I wanted to know why. What would you do?
Q Maybe it was because Mr. Wood counted the money and found out you guys got ripped off $400.00 that you were looking for Bonnell?
A I don't understand the question.
Q If the deal was to go down for $1750—$175.00 a pound, that is what you discussed?
A I said I was trying to buy for $100.00.

Q You mentioned $175.00 a pound?
A Yes.
Q Ten pounds.
A To buy one pound it was $175.00. Take them all you can have them for $100.00 a pound. That is what the deal was.
Q What is ten times 175?
A $1750.00.
[424] Q $1750.00?
A Yes. $175.00 if he would sell one pound. He said $1,000 he said $1200 and might come down to $1,000.
Q If he was talking about $1,000 why did he throw $1300 in the car?
A I don't know. That is why I was chasing him.
Q To give the money back?
A No, to find out what was going on.
Q Not because you were mad because he was guilty of breach of contract?
A No contract.
Q The deal 10 pounds for $175.00 a pound for $1750.00 and you only got $1320?
A No money for nothing. I don't know whose money it was until we was pulled over by your police officers.
Q You got pulled over by police officers?
A Yes.
Q Who put the money under the mat?
A I believe Mr. Wood did.
Q Why didn't he tell them about Mr. Bonnell?
A Because we didn't know what was going on and wanted to find out.
Q So he hid the money under the mat?
A The police officers said they stopped us for a red light. I wanted to get my hands on Bill Bonnell.
[425] Q It wasn't because you were guilty, was it?
A Because I wanted to get my hands on Bill Bonnell because I suspected he was trying. .
Q Why didn't you tell the police that Bill Bonnell just set you up?
A Because I would rather have my own hands on him.

BY MR. WILLIS: Object to the prosecutor's question.
BY THE COURT: Overruled, but I don't think we have to get so loud.
Q So any way, when the police got there the money was under the mat and the car doors locked?
A When the police got there we were both sitting in the car. I rolled down the window and talked to the police officer and he told me I ran a red light.
Q When Mr. Beamer arrived?
A Mr. Beamer said—I can't remember if I got out of the car or not before Mr. Beamer got there. I can't remember. I am trying to but I can't, but when Mr. Beamer got there I said to Mr. Beamer what the hell is all this about and he said you are under arrest for the suspicion of selling marijuana and I said you got to be crazy. I was pretty upset.
Q You didn't find it in your heart to tell Mr. Beamer what you said today?
[426] BY MR. WILLIS: Object to the question and further ask the court to withdraw a juror and declare a mis-trial.
BY THE COURT: Motion overruled. The witness is entitled to have the question re-read and answer it.

(Question re-read)

A I don't understand the question.
BY THE COURT: Please put another question.
Q All right, Jeff. You come to court today?
A Yes.
Q With testimony?
A Yes.
Q And correct me, if I am wrong. You are also under indictment for this offense?
BY MR. WILLIS: Objection.
BY THE COURT: Overruled.
A Yes, sir.
Q And so it is fair to say you have an interest in this cause?
A Yes, sir, I feel I am being framed. I know I am and am pretty upset.

Q So on the night of April 29 you felt that you were being framed [427] like you are being framed today?
A I was so confused that night, the night of the arrest.
Q How about Mr. Wood?
A Mr. Wood didn't know what was going on.
Q He was cool enough of mind to insert a large amount of money under a mat in the right front seat?
A I think that you are right, sir. I think when we were pulled over it was a big wad of money.
Q It is in the picture. Does it look familiar?
A He had the wad of money and he put it under the front seat.
Q Who gathered it up off the back seat?
A Mr. Wood did. I was driving the car.
Q Got it together and wadded it up and inserted it under the right front seat mat?
BY MR. WILLIS: Objection.
BY THE COURT: He may answer.
A I think he at the time said what do I do with this? I didn't know what to do with it. I was shocked.
Q Mad?
A I wanted to know what was going on. What would you do?
Q Let me ask the questions, Jeff. Are you as mad and upset today as you were that night?
A I can't answer that question.
[428] Q Did you feel the same way about what happened to you?
A That night I felt like I couldn't believe what was happening.
Q You didn't like being framed?
A That is right. I didn't like some one putting me in a spot like that.
Q Didn't it occur to you to try to protect yourself?
A Yes, at this time I felt like I wasn't talking to nobody but John James who was the attorney at that time.
Q But you felt. . .
A The man walked up and didn't ask me anything.

Q You didn't talk to a soul about how rotten it was because you were framed?

BY MR. WILLIS: Objection.

BY THE COURT: He can answer. If he made that statement.

A I will answer the question, sir, the best I can. I didn't know what to say. I was stunned about what was going on and I was asked questions and I answered the questions as simply as I could because I didn't have nobody there to help me answer the questions.

Q Wouldn't that have been a marvelous time to protest your innocence?

BY MR. WILLIS: Objection.

[429] BY THE COURT: You may answer yes or no.

A I don't know if it would or not.

Q Do you remember having a conversation with Kenneth Beamer?

A Yes, sir.

Q What was said?

BY MR. WILLIS: Objection.

BY THE COURT: He may answer.

A Kenneth Beamer said I want to know where you stash—where your hide out is, where you are keeping the dope and I said I don't know what you are talking about. I believe the question was asked in front of you.

Q Where did this conversation take place?

A Took place during the search.

Q Did you have any other conversation with Kenneth Beamer?

BY MR. WILLIS: Objection.

BY THE COURT: Sustained. Get more specific.

Q So any way you didn't tell anyone how angry you were that night?

BY MR. WILLIS: Objection.

[430] BY THE COURT: He may answer.

A I was very angry.

Q But you didn't tell anyone?

A That is right. If I started I don't know where I would have stopped. I was upset.

Q I can understand that, Jeff.

A Thank you.

Q You conversed about this case since that time with your lawyer?

A With my attorneys, yes.

Q And naturally you were present at the preliminary hearing in this case?

A Yes, sir.

Q Remember that is the probable cause hearing?

A Yes, sir.

Q And you heard the testimony of all the witnesses in that case against you?

A Yes, sir.

Q And your attorney was able to secure a verbatum transcript of the tape recording of all the witnesses that testified against you in that case?

A So.

Q So did you listen to those tapes?

A I listened to parts of them, yes, sir. I have a gadget tape [431] recorder of my own.

Q You were permitted to listen to all?

A I asked to listen to them.

Q After you listened to all the tapes you knew exactly what the witnesses would say against you?

A I didn't listen to them—I could remember what was said.

Q You were there and heard what was said and you had the tapes to review as to what they said?

A Yes, sir.

Q So after you had the opportunity to hear this testimony against you and these tapes is the first time we, representing the State of Ohio, have ever heard what you had to say about what happened that night.

BY MR. WILLIS: Objection.

BY THE COURT: Sustained.

BY THE PROSECUTOR: No further questions.

• • • •

CROSS EXAMINATION OF RICHARD WOOD

(Testifying in his own defense)

[465] Q So you whipped around the block a couple times and got stopped by the New Philadelphia policemen?

A Yes.

Q Is that the time you took the bills and shoved them under the mat?

A I think I shoved them under before.

Q Which of you locked the doors?

A I don't recall.

Q They got locked, didn't they?

A I think Mr. Beamer locked them, if I recall right.

Q Mr. Beamer did arrive on the scene?

A Yes, he did.

Q And I assume you told him all about what happened to you?

BY MR. WILLIS: Objection.

BY THE COURT: What is the reason for the objection?

BY MR. WILLIS: He is not required to tell Mr. Beamer anything.

BY THE COURT: He may answer.

A No.

Q You didn't tell Mr. Beamer?

BY MR. WILLIS: [466] Objection.

BY THE COURT: Overruled.

A No.

Q You didn't tell Mr. Beamer this guy put $1300 in your car?

BY MR. WILLIS: Objection.

BY THE COURT: Overruled.

A No, sir.

Q And we can't understand any reason why anyone would put money in your car and you were chasing him around town and trying to give it back?

BY MR. WILLIS: Objection.

BY THE COURT: You may answer.

A I didn't understand that.

Q You mean you didn't tell him that?

BY MR. WILLIS: Objection.

BY THE COURT: Overruled.

A Tell him what?

[467] BY THE COURT: Ask the question again.

Q Jefferson Doyle said he was confused, angry and upset. Were you confused, angry and upset?

BY MR. WILLIS: Objection.

BY THE COURT: Overruled.

A Upset and confused.

Q Why were you upset?

A Because I didn't know what was going on most of the time.

Q Why would you be upset? Because you found $1300 in your back seat?

A Mainly because the person that was in the car Jeff was upset and confused and angry and. .

Q What has that to do with you?

A I am in the car. That is what it has to do with me.

Q You didn't witness anything that went on between Mr. Bonnell and Mr. Doyle, did you?

A No, but you don't find a bunch of money laying on the back seat for nothing.

Q And you had not participated in this transaction, had you?

A No.

[468] Q Yet you are the one that gathered the money up?

A Can't drive a car and get in the back seat at the same time.

Q And you are the one who decided it should be inserted under the mat?

A We were stopped by policemen.

Q What are you so confused and upset about?

A Involved in something.

Q But you don't know what it is about, correct?

A Primarily, yes.

Q You are as pure as the driven snow, is that correct?

BY MR. WILLIS: Objection.

BY THE COURT: Overruled.

A What do you mean?

Q You are innocent?

A Yes.

Q Of anything?

A I don't know about anything.

Q This particular incident, you were placed under arrest, weren't you?

A Yes, innocent of this incident.

Q Innocent of the entire transaction?

A Yes, sir.

[469] Q Or even any knowledge of the entire transaction?

A Up to a point, sir.

Q Yet you have knowledge to gather the money, count it, wad it up and insert it under the front seat of the Cutlas car?

A Yes, sir.

Q Mr. Wood, if that is all you had to do with this and you are innocent, when Mr. Beamer arrived on the scene why did't you tell him?

BY MR. WILLIS: Objection.

BY THE COURT: You may answer.

A Mr. Cunningham, in the last eight months to a year there has been so many implications, etc. in the paper and law enforcement that are setting people up and busting them for narcotics and stuff.

Q That is interesting. What did narcotics have to do with the money in the back seat?

A I was under the impression . .

Q Where did you get your impression?

A After the money was in the car.

Q Jeff started telling you the whole thing?

A No, something about being set up.

Q It wouldn't be that you know considerably more about this than [470] you are admitting to?

A Not really.

Q It wouldn't be the reason you rode to Denver with Mr. Bonnell so you could keep an eye on Mr. Bonnell so Mr. Doyle could go and pick up ten pounds of marijuana?

A No.

Q Of course not?

A No.

Q But in any event you didn't bother to tell Mr. Beamer anything about this?

A No, sir.

Q As a matter of fact you never told anyone that you had been set up until today?

BY MR. WILLIS: Objection.

BY THE COURT: Overruled.

A Yes, I believe I did, sir.

Q I assume you discussed it with your lawyer?

A Yes, I discussed it with my lawyer.

Q And you heard the testimony and witnesses against you?

A Yes, sir.

Q And were you aware Mr. James was able to obtain a tape transcript of the proceedings?

A Yes.

[471] Q And you no doubt listened to those?

A Parts and portions of them—some of it.

Q But you never communicated your innocence?

A I believe I did one time to Mr. Beamer.

Q When might that have been?

A When in the jail house.

Q So you protested your innocence?

A In a little room. I believe he asked us how do you let people get away with people setting up friends like this. He said Bill Bonnell is not your friend and I said no, but I figured he was a good enough acquaintance he would do that.

Q Where was that?

A Little room there.

• • • •

DIRECT EXAMINATION OF KENNETH BEAMER
AS A REBUTTAL WITNESS

[488] BY THE COURT: Now ladies and gentlemen of the jury, there has been a question put to this witness relative to a conversation between this witness and another witness, Jefferson Doyle, after the arrest of the witness, Jefferson Doyle. The court is going to permit the witness to testify as to a conversation. This testimony will be given to you for one purpose and one purpose only and that will go toward the impeachment of the testimony of Jefferson Doyle. It will not go, and you may not consider it relative to the innocence or guilt of this defendant. With that stipulation you may testify.

BY MR. WILLIS: Objection.

BY THE COURT: You may answer.

A I stated to Mr. Doyle on the way back, I said, Jeff, what are you doing in the dope business, and he said, I don't know, Kenny. I don't know. I stated that I heard there may be more out on Route 39 in a ditch or culvert. .

BY MR. WILLIS: Objection.

BY THE COURT: He may testify for the limited purpose.

[489] A (Cont) I said if you have more, Jeff, I want it—I want it all. He said there isn't any more. That is all we had with us.

BY THE COURT: As to that conversation, the court will permit the defendant to have a continuing objection as to the statements that have just been made by this witness. That is for the purpose of the record.

Q So it is fair to say, is it not, Mr. Beamer, that he didn't protest his innocence?

BY MR. WILLIS: Objection.

BY THE COURT: He may answer.

A That is correct, sir.

Q All right, now, referring your attention specifically to Richard Wood, to this defendant, did you have any conversation with the defendant Richard Wood?

BY MR. WILLIS: Objection.

BY THE COURT: Overruled.

A Yes.

Q And did the defendant, Richard Wood, the defendant in this case—first of all, back up. When exactly did you have a conversation, if any, with the defendant, Richard C. [490] Wood?

A The first I spoke to him was when I arrived at the scene where the New Philedalphia police officers had Mr. Doyle and Mr. Wood stopped. Just merely spoke and placed him under arrest and gave his his rights.

Q Did he say anything to you?

A Just "hi" and that is it. No conversation on his part.

Q He was then taken to the Tuscarawas County Jail?

A Yes.

BY MR. WILLIS: May I have an objection to this line of questioning?

BY THE COURT: I would prefer as it relates to defendant, you object each time you feel it is necessary.

BY MR. WILLIS: Objection.

BY THE COURT: Overruled.

Q And Kenny, did you have an opportunity to have any conversation with the defendant, Richard Wood, at that time and place?

A Yes, sir.

Q When was that?

A Just moments after we all arrived at the Tuscarawas County Jail.

[491] Q Advise us what the nature or circumstances of that conversation was.

BY MR. WILLIS: Objection.

BY THE COURT: Overruled.

A I asked Mr. Woods if he rented the Oldsmobile that we had stopped.

Q What did he reply?

BY MR. WOODS: Objection.

A He replied "yes".

BY THE COURT: It may remain.

Q And did you have any other or subsequent conversations with Mr. Woods?

A Yes, sir.

Q Please enlighten us as to when it was.

BY MR. WILLIS: Objection.

BY THE COURT: He may answer.

A At the same time I asked Mr. Wood. .

BY THE COURT: He asked you when or if you had any further conversations.

[492] A Yes.

Q At the same time?

A Yes.

Q What was the nature or circumstances of that conversation?

A I asked Mr. Wood if he would sign a consent to search his vehicle.

BY MR. WILLIS: Object and move the answer be stricken and the jury instructed to disregard it.

BY THE COURT: Now I think this witness has testified to that—that permission was not given.

BY MR. WILLIS: I asked that the jury be instructed that no person is required to give consent and no inference can be drawn from that.

BY THE COURT: The court will instruct the jury that consent was not given nor is there any responsibility that consent should be given under the factual set up in this case.

Q At any time, Mr. Beamer, did Mr. Richard C. Wood protest his innocence to you?

BY MR. WILLIS: Objection.

BY THE COURT: Overruled. You may answer yes or no.

[493] A No, sir.

Q Kenny, at any time did Mr. Wood indicate to you that he had or felt he was framed or set up?

BY MR. WILLIS: Objection.

BY THE COURT: Overruled.

A No, sir.

Q Would it surprise you if you heard him testify that he told us that?

BY MR. WILLIS: Objection.

BY THE COURT: Sustained the objection. This witness testified as to a conversation. You are asking for an emotional response and I will sustain the objection on that ground.

Q At any time after the time he was placed under arrest thru the period of the subsequent investigation that morning did Mr. Richard C. Wood tell you that he was innocent—that he had been set up or framed, or both?

BY MR. WILLIS: Objection.

BY THE COURT: He already answered the question.

[494] BY THE PROSECUTOR: Not for that entire period of time.

BY THE COURT: You may answer yes or no.

A No, sir, he did not.

Q Did you have any conversation with him subsequent to the time that he refused to sign the consent to search—you already testified about the search warrant that he would not consent.

BY MR. WILLIS: Objection.

BY THE COURT: We have been over it. This witness said he did not have such a conversation with the defendant and I see no need to go over it.

BY THE PROSECUTOR: That is all I have.

• • • •

DEFENSE COUNSEL'S CLOSING ARGUMENT[2]

• • • •

[15] If Mr. Doyle dealt with Bonnell now wasn't the time to resolve it. What was his motive. He knew Bonnell and knew where he lived. He called him on the

---

[2] Defense counsel's closing argument is not included in the main Transcript of Proceedings, but was transcribed as a supplement thereto. Page reference [15] refers to the supplement captioned "Closing Argument of Mr. Willis."

telephone. He wouldn't be difficult to find. Doyle didn't have the marijuana now—we know that. Then they are arrested. What happens then? They are told that they have a right to an attorney. Anything wrong with that? Here we all have a right to an attorney. So when he is told he has a right to an attorney and he says he wants to exercise that right. Is there anything wrong with that. [16] When you tell a man he has a right to an attorney and he says he wants to exercise that right, is that wrong? Are they to be penalized because they don't protest their innocence at the point of arrest? Can he reserve his defense for the court? If there is to be a vocal accusation is he to be penalized because he don't protest his innocence to the police. Isn't he better off not saying anything until he gets legal advice?

I think that is sound advice any lawyer can give. You are better off with legal advice than without it. The prosecutor would penalize this man because he didn't protest his innocence. He didn't have to do that. Everybody has the right to reserve his defense for presentation in the court room and he can't be penalized because he didn't try his case in the police station.

So what happened? He wanted to get in touch with his lawyer and he did so. Any lawyer worth his salt would advise the client not to make any statement under any circumstances.

* * * *

PROSECUTOR'S CLOSING SUMMATION IN THE WOOD TRIAL.[3]

[12] The defense in this case was very careful to make no statements [13] at all until they had the benefit of hearing all the evidence against them and had time to ascertain what they would admit and what they would deny and how they could fit their version of the story with

[3] The prosecutor's closing summation may be found in the supplement to the main Transcript of Proceedings, captioned "Closing Argument of the Prosecutor."

the state's case. During none of this time did we ever hear any business about a set up or frame or anything else. All right.

Yes, it is the law of our land, and rightfully so, ladies and gentlemen, that nobody must be compelled to incriminate themselves. It is the 5th Amendment. No one can be forced to give testimony against themselves where criminal action charges are pending. It is a very fundamental right and I am glad we have it.

The idea was nobody can convict himself out of his own mouth and it grew out of the days when they used to whip and beat and extract statements from the defendants and get them to convict themselves out of their own mouth, and I am glad we have that right.

But ladies and gentlemen, there is one statement I am going to make. If you are innocent, if you are innocent, if you have been framed, if you have been set up as claimed in this case, when do you tell it? When do you tell the policeman that?

BY MR. WILLIS: Objection.

BY THE COURT: He may ask the question. It is something for the jury.

BY MR. CUNNINGHAM: Think about it. After months—after various proceedings and for the first time? I am not going to say any more about that but I want you [14] to think about it. So once again, once again, please, when you consider this case, think about the facts in this case and don't be distracted by personalities, or attacks on me, Beamer, or anyone else. Think about the case. Think about it in its prospective.

One more thing. It is a big case—big case. This is a big case. This is being smoked at Ohio University—Ohio State campus, Kent, etc. What is this all about.

I'll tell you what it about, ladies and gentlemen. Smoking a cigarette and I don't want to comment on it, but this is not about smoking a cigarette. Call it big or small relative to what goes on somewhere else. What we are talking about is money. Lots of it. Cash. Big business—big profits and it is against the law because

it is a drug—it is a narcotic and we don't want it in our county. I don't want the likes of Mr. Doyle and the likes of Mr. Woods selling big quantities of marijuana to our kids. We don't want them to profit at the expense of this county and people in this county. So don't tell me what they do at Ohio State or what they do at Kent or what they do at Muskingum. I especially don't like it when they come in and make big money on it.

Convict them because they are guilty, ladies and gentlemen. Thank you.

* * * *

No. 10657

STATE OF OHIO

vs.

RICHARD WOOD

Tuscarawas County, Ohio

TRIAL COURT'S RULING ON MOTION FOR JUDGMENT OF ACQUITTAL

BY THE COURT: There is filed with this court a motion containing two branches—first that of a Motion for a New Trial and a motion for a Judgment of Acquittal.

After hearing the arguments of counsel, maybe it would be wise for the court to say he too sat thru this trial and it is amazing how opinions can differ. But the record must stand as it is and we will all have to live with it.

In the motion for a New Trial, the first point raised by the defendant was that the court erred in denying the pretrial motion to suppress illegally seized evidence.

The second branch is tied into the first branch following up by the fact that if it was illegally seized, the records of seizure cannot be used in court. This matter was argued before Judge Rice and the court does not have the benefit of those arguments, however this court will stand upon the ruling that was handed down on the issue of whether or not it was illegally seized evidence as ruled on by Judge Rice and since his ruling was that the evidence was legally seized, this court will overrule Branch 1 and 2 as it relates to the motion for a New Trial.

The Third Branch goes to the court erred in admitting certain hearsay and other incompetent evidence. The court has reviewed its records and the court is without benefit of argument, on this particular point, and the

court will stand upon the record and overrule Branch 3 of the motion for a New Trial.

As to Branch 4, the court erred in admitting testimony of State's witnesses, Bonnell and Beemer, tending to show Bonnell was sought by a hit man—that is a hired killer. The court feels there was no prejudicial error in allowing that testimony to go into the record.

As to Branch 5, the court erred in restricting defense cross examination of several prosecution witnesses. The court is of the opinion that each of the witnesses presented by the State of Ohio were thoroughly and skillfully cross examined by Attorney Willis and the court feels that branch should and will be overruled.

The court erred in permitting the State, under the guise of refreshing the witness Griffin's recollection to show a significant segment of an unsigned written report made by another and different officer. The court has thought about this branch. As the court recalls, there was a request on behalf of the defendant to play back tape which represented the record in the county court where the preliminary hearing was held to show the statements of the Witness Griffin. The state did present a paper which was marked but the same was denied by the court to go to the jury and the court feels that the witness Griffin was thoroughly interrogated and that his testimony was shown both in the record at the preliminary hearing and as he testified at this trial and the court is hard pressed really to see where the defendant has been prejudiced in any way thru the testimony of Mr. Griffin. Branch 6 will be overruled.

Branch 7 goes to the heart of one of the arguments of the defendant and that is the interrogation of Witness Doyle relative to his failure to protest his innocence at the time of the arrest or thereafter. The court will reserve ruling on No. 7 at this time.

Now we will go to No. 8. The court erred in permitting the prosecution to develop through the testimony the witness Doyle, and the defendant, that they refused to consent to the search of the car. The basis upon which the search was made or a search warrant secured are

matters that have to be explained and settled before the trial and it was done in this case and as it ought to be. The court feels it was incumbent on the State of Ohio to get some evidence out here relative to the fact that a search was necessary and the court doesn't feel that the defendant was prejudiced. The court felt there might have been a further explanation of that and I think it was handled with as meager testimony as possible in order to establish points which the State had to substantiate.

Branch 9—the court erred in permitting the prosecution to develop, through his cross examination of the defendant, that he did not protest his innocence upon being arrested. This, of course, is tied in directly to the same ground as listed in No. 7 and the court will defer ruling on that at this time.

Branch 10—The prosecutor was guilty of misconduct in arguing to the jury that the failure of the witness Doyle, and the defendant, to protest their innocence, or to otherwise disclose their defense, earlier than at the trial, and that their failure to consent to a search of the vehicle, were circumstances that could be weighed arriving at a verdict in this case. The court will reserve ruling on this at this time as in Branch 7 and 9.

Branch 11—the court erred in permitting the witness Beemer to testify on rebuttal without a proper foundation that the witness Doyle admitted to him they had brought the contraband involved in this case into the county. The jury was instructed as to the limited purpose for which this testimony was received and I believe that they did follow the instructions of the court. I think it is further amplified by the fact that the jury spent some four hours in arriving at a decision in this case. I think it points up to the fact the jury was responsible. The court is of the opinion that the prosecutor testified that he did not have knowledge of the statement that Mr. Beemer made in this trial until shortly before he made it. Therefore the Court will overrule Branch 11 but I will say this—that if the court had any evidence there was prior knowledge by the State of this statement then the

court would have felt it was a prime issue and overruled or granted a motion for a new trial on this issue alone.

As to Branch 12—the court erred in failing to give, or appropriately incorporate into its general charge, the special request submitted by the defendant. It is a matter of record now that the requests were denied for special instruction, primarily upon the ruling of the court that these instructions were incorporated in with the general charge. We will leave the decision of whether or not the court erred to another day and another court and the court will overrule Branch 12 of the motion for a New Trial.

As to Branch 13, again Mr. Willis as intelligent and competent defense counsel, puts this in. I don't feel it was needed for an appeal in the event he decides to take an appeal. The court will overrule that branch as of this time.

As to Branch 14—the verdict of the jury is against the manifest weight of the evidence and is contrary to law. This is a general complaint which again a good and conscientious counsel will put in their motion for a new trial and the court having sat in the case, feels that branch should be overruled.

Now going back to Branch 7, 10 and 9, now there is a definite difference of opinion here as to what the evidence was between the prosecuting attorney and counsel for the defendant. What we have in this case is the State of Ohio versus Richard Wood and there is a case State of Ohio versus Jefferson Doyle. Jefferson Doyle came into this court as a witness. Therefore there are different rules that apply to a witness than to a defendant. Now upon this issue of statements by Mr. Beamer made in this court relative to statements made to him by Jefferson Doyle, the court has specifically instructed the jury relative as to what purposes and how it should be received. The court believes that the question was never put to Mr. Wood about his protest of innocence but the court does believe that this question was put to Mr. Doyle. There is a difference or at least there is in the court's mind. The court believes that the jury

was properly instructed upon the receipt of this particular bit of evidence.

Now Branch 9 again goes to the cross examination of the defendant. Again the court does not agree with the contention that the defendant was inquired about his protest of innocence in this matter. This was brought up to the attention of Doyle.

As to the argument to the jury, again the court believes that the argument of the State relates to the acts and actions of Doyle directly and without direct reference to the defendant. I am sure Mr. Willis will disagree with that but in looking over all of the issues here sometimes we get so technical that we lose sight of what we are here to do. The court feels that the most important thing in any trial is to get at the truth of the matters and to see that the defendant has a fair trial. The court believes that Mr. Wood did receive a fair trial, was adequately and properly represented by counsel and that the issues were brought before the jury clearly, giving rise for the jury to spend "X" number of hours in deliberating and finally coming back with their verdict, so the motion for a new trial will be overruled in its entirety.

Now we go to Branch 15 which the court is going to consider separately because I think it must—that is the Judgment of acquittal. No. 15 reads very simply but forcibly—there is insufficient evidence as a matter of law to support the verdict in this case.

The court will overrule this motion for judgment of acquittal. The jury spent hours and we will let it stand as it is.

Now the court will grant exceptions to the defendant herein. I don't think you need them, but I will grant them anyway.

Now we will get to the next proposition and that is simply this. That at the time the verdict was returned in this case the court set the date of October 29 for sentencing in this matter.

(Defendant sentenced)

IN THE COURT OF COMMON PLEAS OF
TUSCARAWAS COUNTY, OHIO
STATE OF OHIO v. JEFFERSON DOYLE

CASE NO. 10656

JUDGMENT ENTRY ON VERDICT AND SENTENCING

(Filed October 16, 1973)

On the 10th day of October, 1973, this cause came on for trial by Jury and the defendant was present in Court throughout said trial, represented by his Attorneys, James Willis of Cleveland, Ohio, and John James of Akron, Ohio. Prosecuting Attorney Arthur B. Cunningham represented the State of Ohio. Said trial began on the 10th day of October, 1973, and continued through the 15th day of October, 1973.

The Jury, having been duly impaneled and sworn, and having heard the opening remarks of the Prosecuting Attorney for the State of Ohio, and those of Attorney Willis, counsel for the Defendant, the testimony and evidence adduced and submitted by the parties hereto, including exhibits, the arguments of the Prosecuting Attorney and counsel for the defendant, and the charge of the Court, and after due deliberation thereon, finds that said defendant, Jefferson M. Doyle, is guilty of sale of an hallucinogen, as set forth in the Indictment filed against him.

The Court thereupon inquired of either party if there was a request that the Jury be polled as to its verdict, and the defendant having requested that the Jury be polled, each of said jurors was polled as to whether or not this was his or her verdict and said verdict was thereupon confirmed. It is so ordered.

The matter then came on for sentencing. Whereupon the Court inquired of the defendant whether or not he had anything to say why judgment should not be pronounced against him and the defendant having nothing further to say than what he had already said, and the

Court having heard the remarks of the Prosecuting Attorney and those of counsel for the defendant, did then and does hereby Order, Adjudge and Decree that the Defendant be sentenced to the Ohio State Penitentiary for a period of not less than twenty nor more than forty (20-40) years, and to remain incarcerated therein until pardoned, paroled or otherwise released according to law.

It is further ordered that the defendant pay the costs herein, taxed at $_____.

It is furthered ordered that a warrant be issued to the Sheriff of this County to convey said defendant to the Ohio State Penitentiary, as provided by law, and that the defendant is hereby remanded to the custody of the Sheriff in accordance with the terms hereof.

_____

/s/ Raymond C. Rice
Judge, Common Pleas Court

IN THE COURT OF COMMON PLEAS OF
TUSCARAWAS COUNTY, OHIO
STATE OF OHIO v. RICHARD WOOD

CASE NO. 10657

JUDGMENT ENTRY ON VERDICT

(Filed October 18, 1973)

On the 2nd day of October, 1973, this cause came on for trial by Jury and the defendant was present in Court throughout said trial, represented by his Attorneys, James Willis of Cleveland, Ohio, and John James of Akron, Ohio. Prosecuting Attorney Arthur B. Cunningham and Assistant Prosecuting Attorney James C. Shaw represented the State of Ohio. Said trial began on the 2nd day of October, 1973, and continued through the 9th day of October, 1973.

The Jury, having been duly impaneled and sworn, and having heard the opening remarks of the Prosecuting Attorney for the State of Ohio, and those of Attorney Willis, counsel for the Defendant, the testimony and evidence adduced and submitted by the parties hereto, including exhibits, the arguments of the Prosecuting Attorney and counsel for the defendant, and the charge of the court and after due deliberation thereon, finds that said defendant, Richard C. Wood, is guilty of sale of an hallucinogen, as set forth in the Indictment filed against him.

The Court thereupon inquired of either party if there was a request that the Jury be polled as to its verdict, and the defendant having requested that the jury be polled, each of said jurors was polled as to whether or not this was his or her verdict and said verdict was thereupon confirmed. It is so ordered.

It is further ordered that the bond of the defendant be continued and this matter is continued for sentencing on October 29, 1973, at 11:00 A.M.

/s/ HARLAN R. SPIES
Judge, Common Pleas Court

JUDGMENT ENTRY ON SENTENCE

(Filed October 30, 1973)

On the 29th day of October, 1973, this matter came on for hearing in open Court on motions filed for a New Trial or Judgment of Acquittal, by the defendant, and sentencing. The defendant, Richard C. Wood, was present in Court represented by his attorneys, James Willis of Cleveland, Ohio, and John James of Akron, Ohio. The State of Ohio was represented by Prosecuting Attorney Arthur B. Cunningham.

Whereupon the Court, having heard the arguments of counsel for the defendant and those of the Prosecuting Attorney for the State of Ohio, finds the defendant's Alternative Motion for a New Trial or For a Judgment of Acquittal not well taken and the same is hereby overruled.

Thereupon this matter came on for sentencing. The Court heard the statements made by the Prosecuting Attorney on behalf of the State of Ohio, and also the statements of counsel for the defendant, and the Court having personally inquired of the defendant whether or not he wished to make a further statement on his own behalf or present any additional information in mitigation of punishment, and the defendant having personally addressed the Court, the Court did then, and does hereby order, adjudge and decree that the defendant, Richard C. Wood, be sentenced to the Ohio State Penitentiary for an indeterminate period of not less than twenty (20) nor more than forty (40) years, there to remain until pardoned, paroled or otherwise released according to law.

The defendant's Application for Bail Pending Appeal is denied, and the defendant is remanded to the custody of the Tuscarawas County Sheriff.

It is further ordered that the defendant pay the costs herein taxed at ————————————, and that a warrant be issued to the Sheriff of this County to convey said defendant to the Ohio State Penitentiary.

/s/ HARLAN R. SPIES
Judge, Court of Common Pleas

IN THE COURT OF APPEALS, FIFTH DISTRICT
TUSCARAWAS COUNTY

Case No. CA 1108

Decided ————————————

[Filed Court of Appeals Jan. 6, 1975, Tuscarawas County, Ohio, Robert E. Moore, Clerk]

JUDGES:

Hon. Norman Putman, P.J.
Hon. Leland Rutherford, J.
Hon. Paul Van Nostran, J.

STATE OF OHIO, PLAINTIFF-APPELLEE

vs.

JEFFERSON DOYLE, DEFENDANT-APPELLANT

MEMO

APPEARANCES:

RONALD L. COLLINS
Prosecuting Attorney
Court House
New Philadelphia, Ohio 44663
Counsel for Plaintiff-Appellee

JAMES R. WILLIS
1212 Bond Court Bldg.
1300 East Ninth Street
Cleveland, Ohio 44114
Counsel for Defendant-Appellant

PUTNAM, P.J.

This is an appeal in a criminal action from a sentence for illegal sale of marijuana in violation of R.C. 3719.44

(D). Appellant was jointly indicted with Richard Wood but tried separately. Wood's appeal is our separate case number 1109.

Twelve errors are assigned as follows:

1. The court erred in denying the appellant the opportunity to show that certain electors were improperly excluded in connection with jury service.
2. The court erred in failing to grant a change of venue.
3. The court erred in restricting the cross examination of the witness Bonnell as to his possible drug addiction.
4. The court erred in permitting the State, under the guise of refreshing the witness Griffin's recollection, to show a significant segment of an unsigned written report made by another and different officer.
5. The court erred in permitting the prosecution to interrogate the witness Wood in a manner suggesting his (—i.e., Wood's) failure to disclose the substance of his testimony, or to otherwise "protest his innocence", at the time of his arrest was a factor that could properly be considered by the jury in determining his credibility as a witness.
6. The court erred in permitting the prosecution to develop through the testimony of both the witness Wood and the appellant, that they refused to consent to the search of the car.
7. The court erred in permitting the prosecution to develop, through the cross examination of the appellant, that he did not "protest his innocence" upon being arrested.
8. The prosecutor was guilty of misconduct in arguing to the jury that the failure of the appellant to protest his innocence, or to otherwise disclose his defense earlier than at the trial of Richard Wood, and that his failure to consent to a search of the vehicle, were circumstances that could be weighed arriving at a verdict in this case.

9. The court erred in failing to give, or appropriately incorporate into its general charge, the special requests submitted by the appellant.
10. The court erred in denying the various motions (including, but not limited to the motion for judgment of acquittal) made at the close of all the evidence.
11. The verdict of the jury as against the manifest weight of the evidence and is contrary to law.
12. The prosecutor was guilty of misconduct in arguing to the jury his personal opinion as to the guilt of the appellant.

We find the State's evidence, if believed, was sufficient to show beyond a reasonable doubt the following as set forth in appellee's brief:

In April of 1973, William Bonnell, an informant of the Multi-County Narco Bureau and a convicted mine rioter free on bond pending various appeals, made contact with a man by the name of Vincent Cercone, who told Bonnell he could set up or help set up a transaction for a large quantity of marijuana (as it turned out, 10 pounds). On the evening of the 28th of April, 1973, Mr. Bonnell got a telephone call from Jefferson M. Doyle proposing to sell Bonnell 10 pounds of marijuana for $175 a pound, or a total of $1750. Arrangements were made to meet in the Cloverleaf Tavern in Dover, Ohio. Bonnell reported this telephone conversation to the Multi-County Narco Bureau which then tried to gather $1750, but only succeeded in raising $1320. This money was photocopied so it could be traced. Bonnell then proceeded in his pickup truck to the point where he had prearranged to meet with Mr. Doyle. From and after the time Mr. Bonnell met Mr. Doyle and also Mr. Richard Wood in Dover, he was at that time and from then on under constant surveillance by an agent from the Multi-County Narco Bureau, Kenneth Beamer, Agent in charge of Multi-County Narco Bureau, Captain Jack Griffin of the Dover Police Department, Chief Deputy Hobert White of the Tuscarawas County Sheriff's Department and several others.

At approximately 12:30 to 1:00 A.M., Mr. Bonnell was seen by the agents and deputies conducting the surveillance, leaving the Cloverleaf Tavern and going across the street to Nickie's Tavern. Mr. Bonnell was then seen leaving this tavern in the company of Richard Wood. Mr. Doyle was at this time going to pick up the marijuana which was stashed in a culvert on Route 39. Bonnell and Wood got in Bonnell's truck and proceeded across Tuscarawas Avenue to New Philadelphia, Ohio. They parked the pickup truck on North Broadway just north of Beech Lane, near the Club 224 on North Broadway in New Philadelphia.

A very short time later the officers who conducted the surveillance observed a 1973 Oldsmobile Cutlass, driven by Jefferson Doyle, pulled up beside or to the rear of the Bonnell pickup truck. Mr. Doyle flashed his lights. The pickup truck proceeded into the rear of the parking lot of the 224 Club and both vehicles then were in the 224 Club parking lot. Captain Griffin, one of the officers conducting the surveillance, observed Mr. Bonnell receiving a large brown paper bag through the window from Mr. Doyle and saw Mr. Wood get out of the pickup truck and get in the car with Doyle. At this time the parties separated and both vehicles turned right on Second Drive and proceeded North. The surveillance was continued and Doyle and Wood were followed on their route through New Philadelphia. A few minutes later Mr. Doyle and Mr. Wood were arrested for the sale of marijuana to Mr. Bonnell by Agent Beamer of the Multi-County Narco Bureau. In the meantime Mr. Bonnell had surrendered himself and the brown paper bag to the authorities. It was found to contain ten (10) pounds of cannabis sative L. (marijuana).

After Doyle and Wood were arrested, Agent Beamer contacted Mr. Arthur B. Cunningham, Prosecuting Attorney of Tuscarawas County, for aid in preparing an affidavit for a search warrant, which warrant was approved by Judge Raymond C. Rice. This warrant was served and executed upon Doyle and Wood. Mr. Beamer, in the presence of Doyle and Wood, went to the place

where the 1973 Cutlass had been stopped and under guard until the warrant was obtained, and searched the automobile. Mr. Beamer discovered, under the floor mat on the passenger's side of the car, a wad of money. The money was immediately examined by Mr. Beamer and checked against the list of money he had previously copied and he noted that it was the same money he had earlier given to Mr. Bonnell.

We consider each assigned error in turn.

1.

No "refusal to allow exploration into" the system of jury selection appears in the record. Appellant's counsel did not ask to "explore" or produce evidence. He made a brief legal argument respecting certain journal entries and concluded saying (R. 8):

"Thats all we have on that motion Your Honor."

2.

There is no error demonstrated respecting a failure to change venue. There is no record of the voir dire examination of prospective jurors. The record says simply (R. 122 A):

"Thereupon a jury was duly impaneled and sworn."

This recital is conclusive upon us in the absence of an affirmative showing to the contrary. None has been made.

3.

Cross examination of the witness Bonnell respecting his possible drug addiction was not erroneously restricted. Appellant was represented by skilled counsel who abandoned this subject before he really ever got started upon it, after a few questions about past use of benzedrene. The court asked counsel to show relevance whereupon the inquiry was suddenly dropped. (R. 178, 179).

(By Mr. Willis)

Q. You used drugs, didn't you?
MR. CUNNINGHAM: Objection, Your Honor.
THE COURT: Sustained.
Q. Mr. Bonnell, in your life have you ever used narcotics?
MR. CUNNINGHAM: Objection.
THE COURT: Sustained.
Q. You know what narcotics is, don't you?
A. Yes.
Q. Now specifically referring to benzedrine, do you know what that is?
MR. CUNNINGHAM: Objection, Your Honor, we are talking about 10 lbs. of marijuana.
MR. WILLIS: We are talking about his credibility too.
THE COURT: Objection will be sustained.
Q. Did you ever testify that you use narcotics, Mr. Bonnell?
MR. CUNNINGHAM: Objection!
Q. Isn't it a fact that you testified that you used--
MR. CUNNINGHAM: Objection!
MR. WILLIS: (Continuing) Benzedrine?
MR. CUNNINGHAM: Object!
THE COURT: It appears irrelevant unless it can be shown otherwise the objection will be sustained. (R. 178).

4.

The State's witness Captain Griffin, when cross examined by appellant's counsel respecting his surveillance of the "sale" (R. 362-3):

Q. Now, when you finally came to a stop, you said you saw the informant standing with a package under his arm?
A. Yes.

Q. Did you see where the package came from?
A. He was standing on the passenger side,—driver's side of the automobile, and—no, he came from the car but I couldn't see.

Thereafter, upon re-direct, (R. 371) the prosecutor asked him about a report (State's Exhibit 11) which Griffin then identified as the report of the transaction prepared by himself and Hobert White (R. 371 lines 6 & 7) and testified, in substance, that he said in the report what he had just said on the witness stand.

We find this was justified by the challenging manner of the cross examination. No error appears. See Harris v. New York, 401 U.S. 222 (1971).

5.

Although Richard Wood was not on trial here, he testified as a defense witness for appellant Doyle. He gave a detailed narrative calculated to exculpate Doyle. He was cross examined by the prosecutor in such a manner as to demonstrate he had not told this story at his first or other earlier opportunities.

We find no error. This is proper cross examination bearing upon the credibility of the witness.

6.

Both appellant Doyle, after he testified on direct as a witness for himself in his own case in chief, and his co-defendant Wood who (although not then on trial) appeared as a defense witness, were cross examined in such a way as to develop the fact that upon first confrontation with the authorities they did not consent to a search of the car.

This was not a subject adduced by the state in its case in chief offered as substantive evidence of guilt but rather cross examination of a witness bearing upon the limited purpose of credibility. Concededly this could not have been shown in the states case in chief but used as

it was on this state of the record for this limited purpose, it was not error.

7.

After the defendant-appellant took the stand and testified in detail as to a narrative of events he claimed to be exculpating, he was cross-examined by the prosecutor, in substance, as to why he did not give this same account when first confronted by the authorities (R. 504-508).

This was not evidence offered by the state in its case in chief as confession by silence or as substantive evidence of guilt but rather cross examination of a witness as to why he had not told the same story earlier at his first opportunity.

We find no error in this. It goes to credibility of the witness.

8.

This assignment goes to the fact that the prosecutor argued to the jury the facts he developed on the cross-examination of the defendant Doyle and his witness Richard Wood which have been discussed in assignments 5, 6 and 7.

There we held the matters were not improperly shown and here we hold they were not improperly argued to the jury.

9.

The ninth assignment of error complains of the refusal of the trial court to give the jury a "cautionary" instruction respecting the testimony of the witness Bonnell, a claimed participant in the illegal sale.

We find no error. In State v. Flonnory, (1972) 31 O.S. 2d. 124, the fourth paragraph of the syllabus reads:

> "4. An instruction to the jury in a criminal case that the testimony of an accomplice is to be "acted upon with the extreme caution" is improper as constituting a comment upon the evidence."

We hold that rule governs here.

10. and 11.

From a careful reading of the record, we find the judgment is not against the manifest weight of the evidence and not contrary to law.

The state's chemist testified that the substance sold was "Cannabis Sativa" commonly knows as marijuana. Appellant argues the state loses unless the witness says the magic letter "L" thereafter, sic, "Cannabis Sativa L". This argument is not well taken. It is clear that the legislature intended by the use of the capital letter "L" after the words "cannabis sativa" to indicate the system of botanical classification.

12.

It is not true in fact that the prosecution at R. 527 or elsewhere, expressed a personal opinion upon the issue of innocence or guilt, or upon the credibility of any witness, nor did he otherwise by his argument, put his own credibility or prestige in the community into the balance.

For the foregoing reasons all twelve assigned errors are overruled, the judgment of the Court of Common Pleas of Tuscarawas County is affirmed and this cause is remanded to that court for the execution of sentence.

Rutherford, J. and Van Nostran, J. concur.

/s/ Norman J. Putman

/s/ Paul D. Van Nostran

/s/ Leland Rutherford
Judges

IN THE COURT OF APPEALS, FIFTH DISTRICT
TUSCARAWAS COUNTY

CASE NO. CA 1109

STATE OF OHIO, PLAINTIFF-APPELLEE

vs.

RICHARD WOOD, DEFENDANT-APPELLANT

MEMO

Decided ————————

[Filed Jan. 6, 1975, Court of Appeals, Tuscarawas County, Ohio, Robert E. Moore, Clerk]

JUDGES:

Hon. Norman Putman, P.J.
Hon. Leland Rutherford, J.
Hon. Paul Van Nostran, J.

APPEARANCES:

RONALD L. COLLINS
Prosecuting Attorney
Courthouse
New Philadelphia, Ohio 44663
Counsel for Plaintiff-Appellee

JAMES R. WILLIS
1212 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
Counsel for Defendant-Appellant

PUTMAN, P.J.

This appeal is a companion case to No. 1108, Ohio v. Doyle. By agreement of all counsel, both were argued and considered together for the reason that they arise out of a joint indictment and a single transaction and al-

though each appellant had a separate trial, both appellants were represented at trial and here by the same skillful and experienced counsel.

Eleven errors are assigned as hereafter set forth. Because all except Nos. #4 and #7 are the same as in the Doyle case (No. 1108) we set forth for the purpose of convenience the appropriate number given the assignment of error in Doyle.

1. The court erred in failing to grant a change of venue. (Doyle No. 2)
2. The court erred in permitting the State, under the guise of refreshing the witness Griffin's recollection, to show a significant segment of an unsigned written report made by another and different officer. (Doyle No. 4)
3. The court erred in permitting the prosecutor to interrogate the witness Doyle in a manner suggesting his (Doyle's) failure to disclose the substance of his testimony, or to otherwise "protest his innocence," at the time of his arrest was a factor that could properly be considered by the jury in determining his credibility. (Doyle No. 5)
4. The court erred in permitting the prosecution to develope through the testimony of the witness Beamer that the defendant refused to consent to the search of the car.
5. The court erred in permitting the prosecution to develope, through his cross-examination of the defendant, that he did not "protest his innocence" upon being arrested. (Doyle No. 7)
6. The court erred in permitting the prosecution to develope, through the cross-examination of the appellant, that he did not "protest his innocence" upon being arrested. (Doyle No. 7) (Notice this is a repeat)
7. The court erred and the appellant was deprived of a fair trial as a consequence of the following circumstances: Pursuant to Rule 16, the prosecutor informed the defense that no statements (admissions or confessions) were made by either the wit-

ness Doyle or the appellant. Despite the apparent reliance of the defense on the prosecutor's response, and in spite of his continuing duty to disclose, the Court allowed the State to show that certain crucial admissions were in fact made.

8. The prosecutor was guilty of misconduct in arguing to the jury that the failure of the witness Doyle, and the appellant, to protest their innocence, or to otherwise disclose their defense, earlier than at the trial, and that their failure to consent to a search of the vehicle, were circumstances that could be weighed in arriving at a verdict in this case. (Doyle No. 8)
9. The court erred in failing to give, or appropriately incorporate into its general charge, the special request submitted by the appellant. (Doyle No. 9)
10. The court erred in denying the various motions (including, but not limited to the motion for judgment of acquittal) made at the close of all the evidence. (Doyle No. 10)
11. The verdict of the jury is against the manifest weight of the evidence and is contrary to law. (Doyle No. 11).

Our memorandum in the case of Ohio vs. Doyle, Tuscarawas County No. 1108, is incorporated herein by reference and made a part hereof as fully as if rewritten herein in full. Appellant's counsel concedes the state's case in chief was substantially the same in both cases. Counsel concedes and we find that both trials were conducted substantially the same even though Doyle was tried before Judge Rice and Wood was tried before Judge Spies. We move now to consider each assigned error in turn.

1.

No error appears respecting the refusal of the trial court to change venue. No record of the voir dire examination of jurors was presented us. The record we do have recites merely (R. 11) that:

"Thereupon a jury was duly impaneled and sworn."

Nothing to the contrary appears.

2.

We find no error in the use by the prosecuting attorney of the report prepared by Capt. Griffin and another, to refresh the recollection of Capt. Griffin upon re-direct examination, taking into consideration the nature of the cross-examination. (R. 272-289 of the Wood case)

3.

Here Doyle, not on trial, was called by Wood in the defense case in chief. The cross-examination was not improper for the same reasons stated in the Doyle memorandum respecting assignment No. 5 in the Doyle case.

4.

Here the state called the witness Beamer in rebuttal to rebut statements made by the witness Jefferson Doyle when cross-examined by the prosecutor. Doyle (not on trial) was testifying in defense of Wood having been called by the defense. Doyle volunteered in cross-examination by the prosecutor, details of a conversation between Doyle and Beamer at the time of his first confrontation with the authorities, at the time of the transaction in question, the night both Doyle and Wood were arrested. (R. 425-429)

This trial of Wood took place in October of 1973 after the Doyle trial had been completed in July of 1973.

No similar incident respecting a clash between the testimony of Doyle and Beamer had developed in the Doyle trial.

We find the testimony of Beamer was proper rebuttal to the testimony of Doyle, and that a proper foundation for the same was laid in cross-examination.

The court held a hearing outside the presence of the jury and found the rebuttal proper. (R. 487). A proper

instruction limiting the use of the testimony to the purpose of impeachment of the witness was given (R. 488).

The court properly found the prosecutor had not violated Criminal Rule 16 by not informing the defense of this rebuttal evidence before trial (R. 487).

5.

This assignment raises the same legal point as assignment No. 7 in the Doyle case and is overruled for the reasons given there. This was not evidence used in the state's case in chief but cross-examination for the purpose of affecting credibility.

6.

This assignment is an apparent inadvertent repeat of No. 5 above.

7.

This assignment is preculiar to this case and did not arise in Doyle's case. The appellant here complains that the prosecutor under Criminal Rule 16, said in writing, August 31, 1973,

> "Defendant made no statements at the time of arrest."

The trial of the case commenced in October, 1973. After the defendant Wood, and co-defendant, not on trial, Doyle, testified for the defense, the prosecutor recalled Kenneth Beamer, who had participated in the investigation and arrest of the defendants. He testified (R. 486-494):

Q. . . . At any point subsequent to the time you placed Doyle or Mr. Wood under arrest, did you have an opportunity to have a conversation with Mr. Doyle?
A. Yes, sir.
Q. And when did you have such conversation?

A. After the search of the vehicle some time after 6:00 a.m. in the morning I took him back to the county jail. He rode in my car.
Q. Jefferson Doyle?
A. Yes.
Q. And what was the circumstances of that conversation?
MR. WILLIS: Objection.
THE COURT: You may answer.
A. I stated to Mr. Doyle on the way back, I said Jeff, what are you doing in the dope business, and he said, I don't know, Kenny, I don't know. I stated that I had heard there may be more out on Route 39 in a ditch or culvert. . .

• • • •

A. I said if you have more, Jeff, I want it—I want it all. He said there isn't any more. That is all we had with us.

• • • •

Q. So it is fair to say, is it not, Mr. Beamer, that he didn't protest his innocence?
MR. WILLIS: Objection.
THE COURT: He may answer.
A. That is correct, sir.
Q. All right, now, referring your attention specifically to Richard Wood, to this defendant did you have an conversation with the defendant Richard Wood?
MR. WILLIS: Objection.
THE COURT: Overruled.
A. Yes.
Q. And Kenny, did you have an opportunity to have any conversation with the defendant, Richard Wood, at that time and place?
A. Yes sir.
Q. When was that?
A. Just moments after we all arrived at the Tuscarawas County Jail.

Q. Advise us what the nature or circumstances of that conversation was.
MR. WILLIS: Objection.
THE COURT: Overruled.

• • • •

THE COURT: He asked you when or if you had any further conversations.
A. Yes.
Q. At the same time?
A. Yes.
Q. What was the nature or circumstances of that conversation?
A. I asked Mr. Wood if he would sign a consent to search his vehicle.
MR. WILLIS: Object and move the answer be stricken and the jury instructed to disregard it.
THE COURT: Now I think this witness has testified to that—permission was not given.
MR. WILLIS: I asked that the jury be instructed that no person is required to give consent and no inference can be drawn from that.
THE COURT: The court will instruct the jury that consent was not given nor is there any responsibility that consent should be given under the factual set up in this case.
Q. At any time, Mr. Beamer, did Mr. Richard C. Wood protest his innocence to you?
MR. WILLIS: Objection.
THE COURT: Overruled. You may answer yes or no.
A. No, sir.
Q. Kenny, at any time did Mr. Wood indicate to you that he had or felt he was framed or set up?
MR. WILLIS: Objection.

THE COURT: Overruled.
A. No, sir.

• • • •

Q. At any time after the time he was placed under arrest thru the period of the subsequent investigation that morning did Mr. Richard Wood tell you that he was innocent—that he had been set up or framed, or both?
THE PROSECUTOR: Not for that entire period of time.
THE COURT: You many answer yes or not.
A. No, sir he did not. (R. 486-494)

Agent Beamer testified he had not written a summary of his conversation with Doyle and he had not told the prosecutor of his oral statement at the time defendant-appellant requested discovery (R. 496-497) and he further added he only told the prosecutor of the statement on the day before he testified as a rebuttal witness, Thursday, October 4, 1973, the third day of trial, after he had already testified as a state witness in its case in chief.

We find no showing that the prosecutor was aware of this oral statement to Agent Beamer before the trial of the case. (R. 515-516).

8.

We find the prosecutor was not guilty of misconduct in arguing to the jury the issue of credibility of the witness Doyle and the witness defendant Wood and pointing to their failure to assert their narratives at the earliest opportunity.

The same reasons apply here as in the eighth assignment in the Doyle case.

9.

The cautionary instruction respecting the testimony of the state's witness Beamer was properly refused. State v. Flonnory, 31 O.S. 2d. 124, paragraph 4 of the syllabus.

10. & 11.

We find from a careful reading of the record that the judgment is not against the manifest weight of the evidence and not contrary to law.

For the foregoing reasons all eleven assigned errors are overruled, the judgment of the Court of Common Pleas of Tuscarawas County is affirmed and this cause is remanded to that court for execution of sentence.

Rutherford, J. and Van Nostran, J. concur.

/s/ Norman J. Putman

/s/ Paul D. Van Nostran

/s/ Leland Rutherford
Judges

THE SUPREME COURT OF THE
STATE OF OHIO

1975 TERM

No. 75-177

THE STATE OF OHIO)
)
CITY OF COLUMBUS)

To wit: April 25, 1975

STATE OF OHIO, APPELLEE

vs.

JEFFERSON DOYLE, APPELLANT

MOTION FOR LEAVE TO APPEAL FROM THE
COURT OF APPEALS FOR TUSCARAWAS COUNTY

It is ordered by the Court that this motion is overruled.

THE SUPREME COURT OF OHIO

1975 TERM

No. 75-177

THE STATE OF OHIO)
)
CITY OF COLUMBUS)

To wit: April 25, 1975

STATE OF OHIO, APPELLEE

vs.

JEFFERSON DOYLE, APPELLANT

APPEAL FROM THE COURT OF APPEALS
FOR TUSCARAWAS COUNTY

This cause, here on appeal as of right from the Court of Appeals for Tuscarawas County, was heard in the manner prescribed by law, and, on motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Tuscarawas County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19..

_____ Clerk

_____ Deputy

THE SUPREME COURT OF THE
STATE OF OHIO

1975 TERM

No. 75-177

THE STATE OF OHIO)
)
CITY OF COLUMBUS)

To wit: April 11, 1975

STATE OF OHIO, APPELLEE

vs.

RICHARD WOOD, APPELLANT

MOTION FOR LEAVE TO APPEAL FROM THE
COURT OF APPEALS FOR TUSCARAWAS COUNTY

It is ordered by the Court that this motion is overruled.

THE SUPREME COURT OF OHIO

1975 TERM

No. 75-178

THE STATE OF OHIO)
)
CITY OF COLUMBUS)

To wit: April 11, 1975

STATE OF OHIO, APPELLEE

vs.

JEFFERSON DOYLE, APPELLANT

APPEAL FROM THE COURT OF APPEALS
FOR TUSCARAWAS COUNTY

This cause, here on appeal as of right from the Court of Appeals for Tuscarawas County, was heard in the manner prescribed by law, and, on motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Tuscarawas County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19..

_____ Clerk

_____ Deputy

SUPREME COURT OF THE UNITED STATES

Nos. 75-5014 and 75-5015

JEFFERSON DOYLE, PETITIONER

v.

OHIO; and

RICHARD WOOD, PETITIONER

v.

OHIO

On Petitions for Writs of Certiorari to the Court of Appeals of the State of Ohio, Tuscarawas County

ON CONSIDERATION of the motions for leave to proceed herein in forma pauperis and of the petitions for writs of certiorari, it is ordered by this Court that the motions to proceed in forma pauperis be, and the same are hereby, granted; and that the petitions for writs of certiorari be, and the same are hereby, granted, limited to Questions 1 and 2 presented by the petitions which read as follows:

"1. Whether an accused who asserts his right of silence and his right to counsel following his arrest properly subjects himself:

a) to questions as to why he did not protest his innocence at the point of arrest, at the Preliminary Hearing, or at some time earlier than at the trial;

b) to the prosecutor's argument to the jury that an unfavorable inference could be drawn against the accused as a consequence of his having exercised these constitutional rights;

c) to questions as to why he did not consent to the search of the car (thus necessitating obtaining a search warrant) and to an argument on this point.

"2. Whether a defense witness who was arrested and charged along with the defendant on trial can be properly asked why he did not protest his innocence earlier than at the trial, and can the prosecutor argue this point to the jury?"

The cases are consolidated and a total of one hour is allotted for oral argument.

October 6, 1975

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 598550 103

ORIGINAL COPY

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

RECEIVED
JUL 28 1975
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JEFFERSON DOYLE *
PETITIONER, *
vs. * NO. 75-5014
THE STATE OF OHIO, *
RESPONDENT. *

* * * * * * * * * * * * * *

BRIEF OF RESPONDENT IN OPPOSITION
TO PETITIONER'S PETITION FOR A
WRIT OF CERTIORARI

* * * * * * * * * * * * * *

COUNSEL FOR RESPONDENT

RONALD L. COLLINS
Prosecuting Attorney
Tuscarawas County
Court House
New Philadelphia, Ohio 44663

COUNSEL FOR PETITIONER

JAMES R. WILLIS, ESQ.
1212 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114

I. QUESTIONS PRESENTED FOR REVIEW.

1. Can an accused or his accomplice-witness take the stand as witnesses at trial and commit perjury with impunity from confrontation with prior inconsistent statements and acts?

2. Does a Trial Court abuse his discretion when he refuses to charge the jury that a paid informant's testimony should be examined with greater than ordinary scrutiny?

II. STATEMENT OF THE FACTS OF THE CASE.

A. PROCEEDINGS BELOW.

The petitioner was originally convicted of sale of an hallucinogen by a jury in the Common Pleas Court of Tuscarawas County, Ohio, on October 15, 1973.

The Ohio Fifth District Court of Appeals subsequently affirmed the conviction, and the Ohio Supreme Court denied defendant's appeal.

This matter is before this Court on the petition for certiorari by the defendant below.

B. THE FACTS OF THE OFFENSE.

On April 28, 1973, the Multi-County Narcotics Bureau, which operates in Tuscarawas County, Ohio, among other counties, received word from one of its informants that he had set up a deal to purchase 10 pounds of marijuana from the defendants. The defendants wanted $175.00 a pound, or $1,750.00 for the 10 pounds.

There was a frantic rush to gather the money in time. Only $1,320.00 could be gathered, but this amount was photocopied so that the serial numbers of the bills could be recorded.

The informant was given the money and went off to his rendezvous at the Cloverleaf Bar on West Third Street in Dover, Ohio. There he met the defendants. Since the Cloverleaf Bar was too crowded to talk business, they went across the street to another bar where the bargain was struck.

(It should be noted that this statement of facts refers to defendants since two men were involved and charged on the same set of circumstances, although the case arrives here with a single defendant because each was tried and convicted separately.)

The defendant Doyle then went to get the marijuana while the defendant Wood stayed with the informant who drove to the nearby city of New Philadelphia, eventually winding up behind a bar called the 224 Club. The informant pulled his vehicle into the parking lot of the 224 Club after receiving a signal from the defendant Doyle who flashed his headlights on and off.

The exchange took place at this location. The defendants gave the informant the marijuana, and he gave them the money.

Now during this entire time, the defendants and the informant were under surveillance by a group of law enforcement officers--some from the Multi-county Narcotics Bureau and some from the Dover Police Department, the New Philadelphia Police Department, and the Tuscarawas County Sheriff's Department. One of these officers, Captain--now Chief--Griffin, of the Dover Police Department, saw the transfer in the parking lot of the 224 Club and testified at trial to that effect.

When the defendants were picked up, they were asked to give consent to have their car searched, but refused. Then police officers secured a search warrant and, sure enough, there was the money which had been photocopied under the floor mat on the passenger side.

C. TRIAL.

Thus, the task of the defense at trial became threefold. 1) It had to undermine the credibility of the State's eyewitness--the informant. 2) It had to undermine the credibility of any witness who tended to back up the testimony of the defendant--specifically Chief Griffin. 3) It had to explain the money.

At trial, the defendants concocted a story about a frame, that the informant had, unknown to them, thrown the money into the back seat, and that they were chasing around trying to return the money to him at the time that they were arrested. How did they explain what they were doing in the company of the informant anyway on that evening? Oh, they were trying to buy marijuana, not <u>sell</u> it.

The Trial Court instructed the jury:

> Now, ladies and gentlemen of the jury, you are the sole judges of the facts, the credibility of the witnesses, and the weight of the evidence.
>
> To weigh the evidence, you must consider the credibility of each witness. You will apply the tests of truthfulness which you apply in your daily lives.
>
> These tests include the appearance of each witness upon the stand; his manner of testifying, the reasonableness of the testimony; the opportunity he had to see, hear, and know the things concerning which he testified; his accuracy of memory; frankness or lack of it; intelligence, interest, and bias, if any, together with all the facts and circumstances surrounding the testimony. Applying these tests, you will assign to the testimony of each witness such weight as you deem proper.

> You are not required to believe the testimony of any witness simply because he was under oath. You may believe or disbelieve all or any part of the testimony of any witness. It is your province to determine what testimony is worthy of belief and what testimony is not worthy of belief.

At trial, two separate juries disbelieved the story of the defendants and refused to find the informant and Chief Griffin impeached witnesses by convicting each of the defendants.

III. SUMMARY OF THE ARGUMENT.

The respondent respectfully submits that this case does not present to this Court those special and important reasons as set out in Rule 19 of the Supreme Court Rules for which a petition for certiorari should be granted.

The extensive quotations from the record in petitioner's brief clearly show that the case is presented here chiefly on a weight-of-the-evidence argument. Surely such matters as credibility of witnesses and resolution of disputed testimony are not those weighty matters with which this Court should concern itself.

The petitioner does argue that the Ohio courts have decided a federal question of substance, but even if that is so, respondent submits that this Court has already ruled authoritatively on the issue, and that the Ohio decisions below are in accord with this Court's applicable decisions.

IV. ARGUMENT.

A. CROSS-EXAMINATION OF A DEFENDANT AS TO HIS PRIOR INCONSISTENT ACTS.

The petitioner apparently contends that the Trial Court committed reversible error by allowing the State to cross-examine the defendants about their inconsistent conduct at the time of their arrest after they took the stand and claimed innocence because they had been framed.

The respondent answers that Harris v. New York, 401 U.S. 222 (1971) is determinative. At page 225 the Court said:

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury...Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately and the prosecution here did no more than utilize the traditional truthtesting devices of the adversary process...
>
> The shield provided by Miranda cannot be perverted into a license to use perjury by way of defense, free from the risk of confrontation with prior inconsistent utterances. (Emphasis added)

The respondent also commends to this Court other well-reasoned, though only persuasive, authority to the same effect. Unites States ex rel. Burt v. New Jersey, 475 F2d 234 (3rd Cir. 1973); United States v. LaVallee, 471 F. 2d 123 (2nd Cir. 1972); United States v. Ramirez, 441 F. 2d 950 (5th Cir. 1971) Cert. den. 404 U.S. 869; United States v. Russell, 332 F. Supp. 41 (E.D. Pa. 1971); Johnson v. People, 473 P. 2d 974 (Colo. 1970).

B. REQUESTED SPECIAL INSTRUCTION AS TO CREDIBILITY OF WITNESSES.

Petitioner next contends that he was entitled to a special cautionary instruction as to the credibility of the informant who testified at trial.

Respondent answers first by disputing petitioner's claims that the informant was a drug addict and that his testimony was uncorroborated. The record clearly shows the informant's testimony was corroborated.

But even if the record did show that the informant was a drug addict and his testimony was uncorroborated (which respondent disputes), then there would be no binding rule of law which required the Ohio Trial Judge to give the jury a special cautionary instruction beyond the proper general charge on credibility as set out in the statement of facts within this brief above.

In Ohio, it is not the province of the Court to classify witnesses, and give to the jury what the experience of the Courts may be in respect to such a class, but their credibility should be left to the jury, under all the competent facts and circumstances of the case before it. State v. Tuttle, 67 Ohio St. 440 (1902).

Many states have similar rules.

it seems strange to the respondent that such a discretionary matter as this could be the subject of a question decided by the Supreme Court of the United States. In order to do so, the Court would have to find, it seems to us, that a trial judge, as a matter of law, is constitutionally mandated by a criminal due process requirement to give a special cautionary instruction on the credibility of certain witnesses. The absurdity of such a rule is apparent by its recital.

V. CONCLUSION.

The respondent believes he is entitled to have the petition for a writ of certiorari denied. The petitioner received a fair trial. The Trial Court committed no error of constitutional, or even prejudicial magnitude. The matters which petitioner present do not show special and important reasons for review in the Supreme Court of the United States.

Respectfully submitted,

Ronald L. Collins

RONALD L. COLLINS
Prosecuting Attorney
Tuscarawas County
Court House
New Philadelphia, Ohio 44663

COUNSEL FOR RESPONDENT

D

#93 Summer List 10

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 75-5014

JEFFERSON DOYLE

Petitioner

vs.

STATE OF OHIO

Respondent

Petr REPLY BRIEF

JAMES R. WILLIS, ESQ.
Attorney for Petitioner
1212 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
216/523-1100

RONALD L. COLLINS
Prosecuting Attorney
Tuscarawas County
Courthouse
New Philadelphia, Ohio 44663

10

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 75-5014

JEFFERSON DOYLE

Petitioner

vs.

STATE OF OHIO

Respondent

REPLY BRIEF

Petitioner's response to the State's opposition to the request for a writ will be restricted to two points. First, we contend that the position expressed in Respondent's Brief, to the point that Harris v. New York, 401 U. S. 222 (1971), is determinative of our contentions based on the exposure to the jury, over objections, that petitioner had exercised his right of silence following his arrest, and in so doing failed to tell the police or the judge at the Preliminary Hearing that his defense to these charges was that he had been framed.

In making this sterile argument, counsel for the Respondent has obviously failed to reckon the cogent observation, made by this Court, in United States v. Hale, ____U.S.____ (June 23, 1975), to the effect that "not only is silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice."

For, surely, if it is a valid conclusion that the "silence during police interrogation [in Hale] lacked signfficant probative value and that any reference to his silence under such circumstances carried with it an intolerable prejudicial impact," (id, at ___), then surely this must likewise be true here. For in our case, contrary to what was done in Hale, the trial court permitted the entire line of assailed questions[1] to be fully exploited. Not only this, the trial court expressly authorized the prosecution to argue these and related points to the jury.

Then there is the fact here that some of the cases "commended" to this Court as well reasoned and persuasive authority in support of their thesis (Brief of Respondent, p. 5), were pointedly rejected by this Court.

Here reference is being made to the cases of United States ex rel Burt v. New Jersey 475 F 2d 234 (3d Cir. 1973); and United States v. Ramirez, 441 F 2d 950 (5th Cir. 1971) cert. den., 404 U.S. 869. Thus, it could not be clearer, the State's espousal of the anachronistic notion as expressed in the following segment of the Opinion by the Court of Appeals, simply cannot be validated. Here the Court of Appeals stated:

> "After the defendant-appellant took the stand and testified in detail as to a narrative of events he claimed to be exculpating, he was cross-examined by the prosecutor, in substance, as to why he did not give this same account when first confronted by the authorities (R 504-508).
>
> This was not evidence offered by the state in its case in chief as confession by

silence or as substantive evidence of guilt but rather cross examination of a witness as to why he had not told the same story earlier at his first opportunity.

We find no error in this. It goes to credibility of the witness." (See Appendix, Petition for Certiorari, p. 42.)

As to all this, it may suffice simply to say that this ruling by the Court of Appeals is diametrically opposed to the position taken by this Court in Hale.

Thus we contend that, for this reason alone, the grant of certiorari in this case should be assured. On the other hand, our case is much stronger than Hale. For, here, the trial court not only overruled our objections to these constitutionally impermissible questions, the Court affirmatively permitted counsel for the State to not only fully exploit this line of questioning, but to argue the resultant inferences, and other related points to the jury. Here we have reference to the additional questions based on why petitioner did not reveal his version of the facts at the preliminary hearing, and why he refused to consent to the search of the car, which required the police to obtain a search warrant.

The above comparisons with this Court's decision in Hale certainly demonstrate crucial flaws in this petitioner's conviction. On the other hand, perhaps an even greater flaw in this conviction is exposed from the fact that in Hale the trial Court had both sustained defense objections to the impermissible line of questioning and instructed the jury to disregard its implications; whereas, the trial Court here not only permitted the entire line of questioning to be exhausted but affirmatively allowed these points to be argued to the jury.

II

Also, the point must be made here that the penalty provision of the statute, under which Doyle was sentenced to a term of 20-40 years for the sale of marijuana, has been declared unconstitutional by the Sixth Circuit Court of Appeals, in Downey v. Perini, ___F 2d___ (decided July 3, 1975, Case No. 74-1929). While a stay of execution has been granted the State in that cause, pending application in this Court for a writ of certiorari, the point must still be made here that should this Court sustain the Sixth Circuit's Downey decision then surely this is a further factor that should cause this Court to deal directly with this cause.

Respectfully submitted,

JAMES R. WILLIS, ESQ.
Attorney for Petitioner
1212 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
216/523-1100

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-5014 & 75-5015

JEFFERSON DOYLE,

Petitioner,

v.

STATE OF OHIO,

Respondent;

and

RICHARD WOOD,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF OHIO TUSCARAWAS COUNTY

BRIEF FOR THE PETITIONERS

JAMES R. WILLIS, ESQ.
1212 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
216/523-1100

Attorney for Petitioners

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-5014 & 75-5015

JEFFERSON DOYLE,

Petitioner,

v.

STATE OF OHIO,

Respondent;

and

RICHARD WOOD,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF OHIO TUSCARAWAS COUNTY

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The judgment entries of the Supreme Court of Ohio, denying further appellate review are incorporated in the

Appendix at pages 67 and 69. The entries filed by the Court of Appeals of Ohio, Tuscarawas County, the judgments under review here, appear at pages 49 to 57, and 58 to 66, of the Appendix. The Tuscarawas County Common Pleas Court entries appear at pages 44 and 46 of the Appendix.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on April 11, 1975. The petitions for writ of certiorari were filed on July 2, 1975, and were granted October 6, 1975. The jurisdiction of this Court was invoked under 28 U.S.C. §1257(3), on the basis that rights, privileges, and immunities under the United States Constitution are contended to have been violated.

QUESTIONS PRESENTED

1) Whether an accused who asserts his right of silence and his right to counsel following his arrest properly subjects himself:
   a) to questions as to why he did not protest his innocence at the point of arrest, at the preliminary hearing, or at some time earlier than at the trial;
   b) to the prosecutor's argument to the jury that an unfavorable inference could be drawn against the accused as a consequence of his having exercised these constitutional rights;

   c) to questions as to why he did not consent to the search of the car (thus necessitating obtaining a search warrant) and to an argument on this point.
2) Whether a defense witness who was arrested and charged along with the defendant on trial can be properly asked why he did not protest his innocence earlier than at the trial, and can the prosecutor argue this point to the jury?

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Amendment V:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Amendment XIV:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ohio Revised Code, Section 2937.11

> "At the preliminary hearing, pursuant to section 2937.10 of the Revised Code, the prosecutor may, but shall not be required to, state orally the case for the state, and shall then proceed to examine witnesses and introduce exhibits for the state, under the rules of evidence prevailing in criminal trials generally, the accused and the magistrate having full right of cross examination and the accused the right of inspection of exhibits prior to their introduction. On motion of either the state or the accused, witnesses shall be separated and not permitted in the hearing room except when called to testify."

Ohio Revised Code, Section 2937.12

> "(A) At the conclusion of the presentation of the state's case accused may move for discharge for failure of proof or may offer evidence on his own behalf. Prior to the offering of evidence on behalf of the accused, unless accused is then represented by counsel, the court or magistrate shall advise the accused:
>
> (1) That any testimony of witnesses offered by him in the proceeding may, if unfavorable in any particular, be used against him at later trial;

> (2) That accused himself may make a statement, not under oath, regarding the charge, for the purpose of explaining the facts in evidence;
>
> (3) That he may refuse to make any statement and such refusal may not be used against him at trials;
>
> (4) That any statement he makes may be used against him at trial.

Ohio Revised Code, Section 3719.44(D):

> "No person shall sell, barter, exchange, or give away, or make offer therefor, any hallucinogen except in accordance with sections 3719.40 to 3719.49, inclusive, of the Revised Code."

STATEMENT OF THE CASE

I

Jefferson Doyle and Richard Wood, the petitioners herein, were convicted in the Common Pleas Court of Tuscarawas County, Ohio, and were sentenced to the penitentiary for the sale of marijuana in violation of *R. C. of Ohio*, §3719.44(D). These convictions were separately appealed to the Ohio Court of Appeals, Tuscarawas County, where they were affirmed.

The Ohio Supreme Court denied further appellate review to both petitioners.

II

The basic facts as developed in the separate trials of Doyle and Wood are pretty consistent. In essence, *Bill*

Bonnell, a convicted felon, with a record consisting of convictions for first degree rioting (R2 27); grand larceny (R2 28) five or six assault and battery cases (R2 56); and numerous convictions for disorderly conduct (R2 56), testified that he bought a quantity of marijuana from Jefferson Doyle.

In short, the State's case was absolutely dependent upon the testimony of Bill Bonnell. As such, his veracity and the ulterior motives behind his actions were extremely important. He had been sentenced to the Ohio Penitentiary, and was desperate to do anything to get out–even turn in his childhood friends (R2 64) in his efforts to induce the officers to come forward in his behalf at his probation hearing which was then pending (R2 32,65,66). Bonnell also admitted that he would not have testified in these cases but for the threat of prosecution, for the additional crimes he had committed, if he failed to do so (R2 69-71).

In a nutshell, Bonnell testified that he was contacted by Jefferson Doyle and they agreed to meet in Dover, Ohio, where a transaction involving ten pounds of marijuana was to be consummated. In anticipation of Doyle's arrival, Bonnell contacted the multi-county Narcotics Bureau. They, in turn, contacted the local police and various surveillance teams were set up. When Doyle came to Dover, Richard Wood was with him (R2 41). Even Bonnell conceded he did not know Wood would be with Doyle (R2 41).

---

* References are indicated as follows:

To the numbered pages of the Transcript of Proceedings in the Doyle trial (R1 –).

To the numbered pages of the Transcript of Proceedings in the Wood trial (R2 –).

To the numbered pages of the Transcript of Hearing on Pretrial Motions (M –).

To the Appendix (A –).

Bonnell testified that after his conversations with Doyle in Dover, Wood rode with him in his truck. Doyle, he testified, in the meantime, went for the drugs (R2 42). They ended up in the area behind the 224 Club, in New Philadelphia, Ohio (Dover and New Philadelphia are twin cities). Here the transfer supposedly took place.

On cross examination Bonnell denied that he had staged this entire episode. In this regard, this witness specifically denied that he had tried to sell Doyle the marijuana he later turned over the the police (R2 79), and he denied having thrown the money in the car then being driven by Doyle (R2 80).

The overall importance of Bonnell's testimony centers upon the fact that he was the only person other than Jefferson Doyle and Richard Wood who was present during the alleged transaction. None of the officers who testified, save Captain Griffin, even asserted that they had seen any transfer take place. Specifically, *Kenneth Beamer*–the agent in charge of the surveillance–testified that he did not see the actual transfer or even the bag (allegedly containing the marijuana) under Bonnell's arm until after the alleged transaction had taken place (R2 155). Although Beamer testified that Detective Hobert White and Captain Griffin had told him that they had observed the transfer (M 20); Detective White testified he did not see any transfer (R2 210, M 80-83). All he [White] could really see was that something was already under Bonnell's arm when they arrived (R2 241, M 61). Further, he denied having told Beamer that he had seen the alleged transaction. More specifically, White stated that what he told Beamer was that when they arrived Bonnell was already standing beside Doyle's vehicle with a package under his arm (M 67,83).

As to *Captain Griffin*, although he could *not* see the alleged transfer when he testified at the preliminary hearing (R2 289,290), at trial he indicated that he had done so (R2 266). This he maintained despite being 200 feet away in the middle of the night, a feat that would have entailed his looking into this deserted parking lot that was surrounded by foliage. Consequently, the credibility given Captain Griffin must be viewed in light of the glaring inconsistencies in the versions he proffered while under oath at different stages of the trial.

III

For his defense, *Richard Wood* (whose case was tried first) testified to facts showing his presence in both Dover and New Philadelphia was most fortuitous. He was at a bar in Akron, Ohio, when Vince Cercone and Jefferson Doyle came in. Upon being queried by Jeff Doyle as to his plans for the evening, Wood revealed he was going to Steubenville, Ohio, to see his daughter. Doyle then asked him if he could ride as far as New Philadelphia with him. Wood says he picked up a few personal items and a change of clothes, and Jeff picked up his wife. The plan was that he would drop Doyle and his wife off at Doyle's sister's in Sherrodsville and pick them up on the way back (R2 439-440).

Wood next testified that Doyle, after they dropped his wife off, indicated he wanted to go into town to see Bonnell (R2 440). This then brought them to Dover and to the two bars.

Inside these bars Wood says he was just "goofing off." He had a "couple of drinks or two" while Doyle and Bonnell talked (R2 441). A point was reached

where "Jeff [Doyle] said he had to go to his sister's or he had to go some place and wanted to know if he [Wood] was going along or would stay there" (R2 441).

Wood testified that his first response was that he would stay there at the bar. It was at this point Bonnell stated that he was going to meet Doyle, and told Wood to ride with him (*ibid*). They eventually ended up in the lot behind the 224 Club in New Philadelphia (R2 442), where Doyle pulled in beside them. Bonnell got out of his pickup truck, and was out of his view for "a couple of minutes" (*ibid*).

When he saw Bonnell coming back, Wood says he got out of the truck and returned to his car. As he opened the car, the interior light showed the money on the back seat. This prompted him to ask Jeff about it. Following this, they started chasing Bonnell (R2 443).

Jefferson Doyle, in testifying as a defense witness in the Wood trial, showed that he was in the Akron bar, when he overheard Vince Cercone mention that Bonnell was dealing in drugs (R2 376). He then decided to get in touch with Bonnell, whose number was obtained through a common acquaintance (R2 377-378).

He recalled telling Wood that, "if you are going down to Steubenville [Ohio], how about taking me and my wife along and drop us off at my sister's house" [in Sharodsville, Ohio, a small town near Dover-New Philadelphia] (R2 379). With this plan set, Doyle called Bonnell, and asked could they get together and do some business. They agreed to meet in Dover (R2 379-380).

Doyle stated he told Bonnell that he did not want Wood to know what they were talking about, because he [Doyle] "knew Woody wouldn't approve" (R2 383). In any event, Bonnell was asked if he [Bonnell] had

any "grass for sale" (R2 384). Doyle indicated to Bonnell that he wanted to buy about two pounds of marijuana, but Bonnell wanted to sell him 10 pounds for $1,000.

Doyle testified his first inclination was that he could raise the money with what he had, what he felt he could get from his sister, and from Woody (R2 384-385).

With that thought in mind, he "took off" for his sister's house (R2 386). After he had gotten two or three miles out of town he changed his mind and started back to the 224 Club (R2 383). Here the record shows the following crucial evidence:

A When I pulled into the Club I * * * flashed my lights so Bill would know it was me * * * and Bill came over to the car with the marijuana and he asked me for the money. I said Bill I hate to tell you this but I can't do it right now – I can't get the money together. If you want to wait a couple days and give me the time to think about it maybe I can. He said, doggone it Doyle, you made a deal to come and I stuck my neck out and I'm here. I said I can't help it, I don't want to do it now. I said I'll buy a pound. I can borrow money off Woody. He said you didn't want Woody to know about it. I said I'll go to the truck and ask him for a loan. He'll give it to me. I'm sure he will. I don't want to use the word he said.

Q He used profanity?

A Yes, and he said profanity and walked away and got in his truck and Woody got out of the truck and came and got in the car.

Q Anything said when Woody got in the car?

A He said where did the money come from?

Q Where was the money?

A In the back seat of the car. I said I don't know. He said he don't know. Where did it come from.

Q Did he say anything about Bonnell throwing something into the car?

THE COURT: Let the witness testify.

THE PROSECUTOR: I am interested in hearing it.

Q Go ahead, Mr. Doyle.

A I think he said – what's that in the car in the back seat and I turned and looked in the back seat and there was money scattered all over the back seat.

Q Then what happened?

A He jumped in the car. I said I don't know. He said did Bill throw that in there? I said I don't know.

Q What did you do after having seen the money in the car?

A I said I didn't throw it in there.

Q What did you do?

A I said Bonnell must have threw it in there. Woody said that son-of- - - - - is trying to frame us or set us up or something that is what he said and I took off to chase after Bill Bonnell.

Q Did you chase Bill Bonnell?

A Yes, sir (R2 388-389).

During the cross examination of Doyle (as a witness in the Wood trial) he was asked with the court's approval why didn't he tell the police Bonnell had set

him up (A 23), and why didn't he "find it in. . . [his] heart" to tell the officers his version of these events (A 23-24). Also, Doyle was asked if he made a statement following his arrest (A 25-26), and "wouldn't that have been a marvelous time to protest. . . [his] innocence" (A 26).

As to all these questions, objections were overruled by the Court, as were various motions for a mistrial.

IV

In his own defense, Doyle again testified to seeing Vince Cercone in Akron, and hearing him mention that Bonnell was dealing in marijuana (R1 465). He repeated his conversation with Wood and about the arrangements made to drop Doyle and his family off in Sherrodsville (R1 467-469).

He reiterated as to how Bonnell was contacted, and he explained that he had asked Bonnell to *make a sale to him.* According to Doyle this was the purpose for which they agreed to meet in Dover.

In explaining his conversation with Bonnell in Dover, the following testimony was rendered:

A I started talking to Bill and I – about buying some marijuana and he said he had some. I asked him how much, and he said it was $175.00 a pound. If I'd take them all, he'd make me a deal. I believe his first offer was $1200.00 for all of them and I thought about it, then he said maybe he could even do it for $1000.00, and I said, –'I don't know if I can get the money." He said – 'Well, what can you come up with?' I said, – 'I got to go out

and see how much money my wife had' and I was figuring then she had about $130.00 or $140.00. I had Forty some dollars on me and I knew that Woody had some money on him, and I knew that if I asked for it, Woody would trust me to loan it to me because he knows I'd pay him back.

Q Do you know how much money Woody had on him?

A I don't know exactly but I knew it was right around $1,000.00.

Q Then what happened?

* * *

A I was going to go out to my sister's house to see if I could get the money to but all ten pounds. I started out to my sister's. I told Bill, you know, – 'Where can we meet later?' Bill said, – I said, – 'Do you want me to come back here?' He said, – 'No, I'll meet you behind Club 224.' I said, – 'Okay.' So I started out to my sister's and I got to thinking, –'What am I going to do with it?' –you know, with that much marijuana.

* * *

Q So when you came to Dover, you were looking for some marijuana to smoke. Is that right?

A Yes, sir.

Q Now, after, you say that you went out to see if you could get your money at your sister's house, what happened at that point, when you started out to your sister's house?

A I didn't know what I was going to do with that much marijuana.

Q What happened?

A I changed my mind and decided to go back and see if I could buy one pound.

Q Then what happened?

A I turned around and came back.

Q Came back into New Philadelphia?

A Yes Sir.

* * *

Q Tell us what happened when you got back in behind the Club?

A I was sort-of scared and I was looking around and didn't see nobody and Bill came up to the side of my truck, - or my car, – He came from his truck up to the side of my car and he said, – 'Did you get the money?', and I said, – 'I can't get that much money but I only want to buy one pound.' He said, – 'Why did you tell me you wanted it all?' I said, – 'Well, I wanted it all but I don't know what I'm going to do with it and I don't know anybody to get rid of that much to.' He said, – I believe he got upset about it because he said he didn't want – if I only wanted one pound, why didn't I say so, so he'd only brought one pound. Something of that nature. That's how the conversation went. I can't say word for word because I was nervous at the time.

* * *

Q At that point, when you indicated to him you only wanted to buy less than all of this, what did he do? Mr. Bonnell?

A He said, – "Forget it.' He said something else. He was pretty upset about it. Then he went around and got back in his truck.

Q Incidentally, was the window down on your car?

A Yes.

Q The car you were driving?

A Yes Sir.

Q Then what happened?

A He went around and got in his truck and Woody, – I guess at the same time, it seemed like, - Woody came around and got in the car.

Q When Woody got into the car, what do you recall happening?

A That's when Woody asked me what the money was doing in the back seat. I didn't know there was money in the back seat. Apparently, Bill threw it in there. I didn't even know it was there til that time. (R1 470-475).

Distilled, Doyle's direct examination was again to the effect that he had been *framed*. And, that it was because he sensed this to be the case, he then drove through the streets of New Philadelphia looking for Bill Bonnell. It was during this effort they were seen by the police and were arrested.

During his cross examination the prosecutor, with the expressed approval of the Court, asked Doyle if he was innocent. Receiving an affirmative response he then asked Doyle the rhetorical question: "That's why you told the police. . . about your innocence?" (A 10-11.) This question, after the Judge's response to our objection contributed to its prejudicial effect, caused him to reply, "I didn't tell them about my innocence. No", and that neither he nor Wood had told the police they had been set up (A 11).

Not satisfied with these responses, and apparently inspired on both by the Court's apparent unwillingness

to protect Doyle against being penalized for having exercised his rights at the point of arrest, and to further prejudice the defense with the jury, the prosecutor, in his quest for a conviction, pressed on. At this point, he asked Doyle whether the arresting officers had asked him if they could search the car. When given the response that it was not his car, the prosecutor just had to inquire "why [he] didn't consent to a search" of the car (A 11), why he didn't protest his innocence at the time the car was searched, and why he didn't protest his innocence at the preliminary hearing after he heard the accusatory testimony of the officers (A 12-13). Even this is not all, the prosecutor forced Doyle to admit that the first time he (Doyle) had given his version of the facts was during his testimony at the Wood trial (A 13).

Richard Wood's evidence, in the Doyle trial, was again to the effect that he had absolutely nothing whatsoever to do with any transaction between Bonnell and Doyle. Further, that he was, as Doyle had testified, en route to Steubenville to visit his family (R1 444). His evidence, which agreed with Doyle's, was that when he entered the car, behind the club (R1 224), he spotted the money "on the back seat" (R1 450). Following this, he says he gathered it up.

According to Wood's testimony as a defense witness in Doyle's trial, they started chasing Bill Bonnell after Doyle remarked, "he had been had" (R1 451).

Wood, too, was asked if he had told the police he had been set up (A 7). Wood was further examined as to whether he had taken the "witness stand" and told the Judge (at the preliminary hearing) he had been set up (R1 456).

Consider, also, on this same point, the following almost unbelievable segment of the record:

> Q So upon your arrest, you didn't tell anybody you had been 'set up' and why you were chasing Bonnell?
>
> * * *
>
> A No Sir.
>
> Q And you didn't testify in your own defense at the preliminary hearing prior to indictment in this case?
>
> A No Sir.
>
> * * *
>
> Q So the first time you testified as to the facts in this case was at your trial?
>
> * * *
>
> A Yes Sir. (A 9.)

The fact that each of these questions was objected to really magnifies our problem.

V

In dealing with the specific questions to be considered by this Court under its grant of certiorari, the following rulings by the Court of Appeals are relevant. To petitioners' contention that it was improper to question them as to why they did not "protest their innocence at the point of arrest", the Ohio Court of Appeals concluded:

> "This was not evidence offered by the State in its case in chief as confession by silence or as substantive evidence of guilt but rather cross examination of a witness as to why he had not

told the same story earlier at his first opportunity.

We find no error in this. It goes to the credibility of the witness" (A 56, 62).

In dealing with the defense contention that it was improper to elicit the fact that Doyle and Wood did not consent to a warrantless search of the car, the Court concluded that:

> "This [too] was not a subject adduced by the State in its case in chief offered as substantive evidence of guilt but rather cross examination of a witness bearing upon the limited purpose of credibility. Concededly, this could not have been shown in the State's case in chief but used as it was here in this stage of the record for this limited purpose it was not error" (A 55-56).

The Court's stated position with reference to the specific question as to the extent a defense witness can be cross examined ruled specifically in these appeals:

> "although the witness (Wood in Doyle's case and Doyle in Wood's case) was not on trial here *he* gave a detailed narrative calculated to exculpate.... He was cross examined in such a manner as to demonstrate he had not told this story at his first or other earlier opportunities... This [the Court held] is proper cross examination bearing upon the credibility of the witness" (A 55).

Having convinced itself that all of these questions were proper, it was an easy decision for the Court to reason that since "the matters were not improperly shown... [they] were not improperly argued to the jury." (A 56 and 65).

SUMMARY OF ARGUMENT

This case is a patent example of the unwillingness of the Ohio appellate courts to vindicate, at the expense of reversing a conviction, the rights these petitioners had to a fair trial. What really makes this wrong all the more gross here is not the fact that these courts must still be totally oblivious to the thrust even of the relevant opinions by this Court, but rather their apparent proneness to summarily disregard meaningful rights in the process.

It is, of course, perfectly understandable why policemen and prosecutors (doubtless because of their narrow and specialized interest), continually urge that only minimum rights should be extended or protected. And, it is also true that every right achieved, by an individual citizen, represents a diminution of power to the policeman and the prosecutor. But when Courts ratify abuses as clear as those in this case, it can only be because they take a grudging view of the concepts of individual rights– a view so very grudging as to condemn, but for the supremacy of this Court, such rights to ultimate extinction.

In this case, the issue (as to Fifth Amendment rights) could not be clearer. When Wood and Doyle were arrested by the police, only one of two things can be true: *either* the police had the right to extract information from them, *or* Doyle and Wood had a right to remain silent. Both rights cannot be said to have co-existed.

If Doyle and Wood had the right of silence, then it follows they cannot peroperly be penalized for having exercised it. If it were otherwise, then there would be

no reason for any policeman to ever use moderation in his attempt to obtain information from those arrested by him.

The question is properly one for this Court. The issue is what kind of a society do we want. Do we want to penalize those who exercise the rights the Constitution proclaims are theirs, or only some of them. The Court's resolution of the issues in this case will surely chart a course that hopefully will be both clear and precise.

For these, and all of the other reasons set forth below, it is hereby urged that the convictions in these cases should be reversed.

ARGUMENT

I.

THE ASSERTION OF A CONSTITUTIONAL PRIVILEGE OR RIGHT IS NOT PROPERLY PART OF THE EVIDENCE TO BE CONSIDERED BY THE JURY, AND NO INFERENCE CAN BE LEGITIMATELY URGED UPON, OR DRAWN BY, THE JURY AS A CONSEQUENCE OF EITHER THEIR HAVING BEEN ASSERTED BY THE ACCUSED OR A DEFENSE WITNESS.

Perhaps a good starting point here is to interpret, or offer an interpretation of, the Ohio Supreme Court's disinclination to grant these petitioners further appellate review. In a nutshell, the State Supreme Court's judgment, which tacitly approved the Court of Appeals' reasoning patterns, lends itself to the unexpressed

opinion that *Harris v. New York*, 401 U.S. 222 (1971), made inapplicable not only this Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), but their own decisions in *State v. Stephens* 24 Ohio St 2d 76 (1970); *State v. Minamyer*, 12 Ohio St 2d 67 (1967); and *State v. Davis*, 10 Ohio St 2d 136 (1967).

For surely if *Miranda* were viewed by them as being controlling there is simply no way questions such as "why they [our petitioners] did not protest their innocence at the point of arrest" could have been approved. This is especially so here since the evidence is clear that petitioners were advised not only as to their right of counsel but silence as well. And both elected not to waive these rights.

As to the specific question which asked petitioners why their version of the events was not revealed at the preliminary hearing, in view of the Ohio Supreme Court's decision of *State v. Davis*,[1] it can only be that they were convinced their decision could not survive *Harris v. New York*. The same must have been their view as to *R.C. of Ohio*, §§2937.11 and 2937.12. Of no mean importance here §2937.12, expressly provides, where an accused is not represented by counsel at his preliminary hearing, that the magistrate *shall* advise him:

---

[1] In *State v. Davis*, the Ohio Supreme Court ruled the trial judge's instruction that the jury should disregard entirely the prosecutor's comment on the fact that the accused did not testify at his preliminary hearing "could not correct the error in the aforementioned conduct of the State." (*Id*, 10 Ohio St.2d, at 137).

"* * *

(2) that... [he] may make a statement not under oath, regarding the charge, for the purpose of explaining the facts in evidence;

(3) That he may refuse to make any statement and such refusal may not be used against him at trial."

Then there is the State Supreme Court opinion of *State v. Minamyer.*[2] This case lends itself to the analogy that if it is prejudicial to reveal to a jury that an accused declined to testify before a Grant Jury, it surely must be at least as prejudicial to reveal that these petitioners declined, on comparable grounds, to make a statement at a preliminary hearing. And surely *State v. Stephens,*[3] should have been applied full force to the arguments made by the prosecutor in these cases.

---

[2]In *State v. Minamyer*, our State Supreme Court had held that "to permit a prosecuting attorney to comment upon the refusal of an accused to testify before a grand jury would have... [a] prejudicial effect and to allow such comment would completely circumvent an accused's constitutional privilege against self-incrimination. Therefore, in a criminal prosecution a prosecuting attorney may not testify as to or comment upon the refusal of the accused to testify before the grand jury". (*Id*, 12 Ohio St.2d, at 69). It is also significant that in *Minamyer*, as had been the situation in *Davis*, the Court held the trial court's instruction to disregard this impropriety was insufficient.

[3]The position expressed by the Court in *State v. Stephens*, was directly to the point that an argument which asks "why didn't... [the defendant] tell the police" that his involvement with a forged prescription was innocent "obviously... [had] a prejudicial effect, and to allow such comment would completely circumvent an accused's privilege against self incrimination." (*Id*, 24 Ohio St.2d, at 78).

This brings us back to the decision in *Harris v. New York*, and to this Court's more recent decision of *United States v. Hale*, ____ U.S. ____ (1975).

While the *Hale* analysis seems close enough to the issues here to provide more than token support for our arguments, it would be unrealistic to a fault if we failed to recognize that in *Hale* this Court expressly noted it had "no occasion to reach the broader constitutional question that had supplied an alternative basis for the [D.C. Circuit's] decision below" (*Id*, ____ U.S. ____; Slip Opinion, p. 2).

At least this much seems certain, no issue survives *Hale* as to whether it is proper in a federal criminal trial to compromise the fair trial rights of an accused on the basis of his failure to waive his right of silence. Thus the gut question here is whether the Constitution also requires this same result in state criminal trials.

In *Griffin v. California*, 380 U.S. 609 (1965), this Court held that "what the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another." The cogency of this principle is, of course, beyond dispute.

The factual background for our contentions shows the petitioner Wood (during his trial) was asked if he told the police his defense when he was arrested (A 28-31); and whether he ever revealed his version of the events prior to testifying at his trial (A 31). All this, as the above references show, was done with the acquiescence and active approval of the trial judge. This is so in spite of the statement, in the trial court's post trial ruling, to the effect that "the court does not agree with the contention that... [Wood] was inquired about his protest of innocence in this matter." (A 43.)

Doyle, as a defense witness in the Wood trial, was asked whether he protested his innocence at the point of arrest (A 26), and whether he ever revealed his version of the events priot to testifying in this trial (A 27). In addition, the prosecutor, with the avid support and sanction of the Court argued all of these points to the jury. (A 37).

During Doyle's own trial, he was asked: [a] if he told the police his defense when he was arrested (A 10-11 and 12); [b] whether he consented to a search of the car (A 11-12); [c] whether he told the Court at the preliminary hearing his defense (A 13); and [d] whether he ever revealed his version of the events prior to testifying in the trial of his co-defendant (*ibid*).

Wood, a defense witness in Doyle's trial, and Doyle in Wood's, were *compelled* to answer, over vigorous and persistent defense objections: [a] whether they protested their innocence at the point of arrest (A 7-8); [b] whether they told the Court at the preliminary hearing their defense (A 8); and [c] whether they ever revealed their version of the events prior to testifying in these trials (A 9).

Also, the record shows, the prosecutor, again with vocalized support and sanction of the Court, argued in both trials most, if not all, of these points to the jury (A 14 and 18; 36-37).

Given the aggressive tenor of the prosecutor's questions, designed to show (as they did) that the petitioners did not either at the point of arrest, or any other time prior to testifying, personally reveal their versions of the crucial events; if it is determined these questions were improper, then there can be no valid contention that they were harmless. In our judgment,

the fact that the trial judge aggressively sanctioned this line of questioning not only magnified the prosecutor's final argument, but also actually compounded these gross abuses of due process.

In *Harris v. New York*, this Court held that an accused's trial testimony could be impeached by proof, inadmissible as a part of the prosecution's case in chief under *Miranda*, which "contrasted sharply with what he told the police officer after his arrest" (401 U.S., at 225). Thus the view gleaned from *Harris*, and apparently seized upon by the Courts below, is that the credibility of an accused can be impeached not merely by his "earlier conflicting statements" (as was the case in *Harris*) but also by his previously asserted right of silence.

It is, of course, significant here that this Court, in resolving conflicting opinions from various circuits, declared, in *United States v. Hale*, that "silence during police interrogation lacked significant probative value and that any reference to his silence under such circumstances carried with it an intolerable prejudicial impact" (*Id*, ____ U.S. ____; Slip Opinion, p. 9).

While this holding was placed in the context of this Court's "supervising authority over the lower federal courts" (*ibid*), it would indeed be an anomaly if the Court's "supervising authority over lower federal courts" were more sensitive to the rights of an accused than is the Court's power as final arbiter of issues raised under the Constitution.

Dealing then with the question as to whether there is a meaningful basis for our contention that the Constitution prohibited not only the questions asked, but the arguments as well; the view as expressed by the D.C. Circuit, in *United States v. Hale*, 498 F 2d 1038

(1974), seems unassailable. Here the Court aptly concluded that this Court's decision in *Grunewald v. United States*, compelled "a finding, as a matter of law, that there was nothing inconsistent between. . . silence in interrogation" (*Id.*, at 1043) and an explanatory defense at trial. As to this expressed position (which is consistent with the one argued by the State below), *Harris v. New York*, 401 U.S. 222 (1971), is said to have sanctioned the forced disclosure that the right of silence, and to counsel, had been exercised.

To begin with, the fact that an accused (even in Ohio) has the right to counsel and the right to remain silent not only following his arrest, but while he is in custody was thought to be beyond dispute. See *State v. Stephens*, 24 Ohio St.2d 76, at 81-82. A necessary corollary of this principle must be that the prosecution may not impermissibly burden, or otherwise penalize, one for having exercised either of these rights. *Griffin v. California*, 380 U.S. 609 (1965). Also see *Johnson v. Patterson*, 475 F.2d 1066 (1975), and *United States v. Nolan*, 416 F.2d 588 (1969).

Given the view, that "prior inconsistent. . . and conflicting statements" obtained in violation of the Constitution (and this would include, as the State sees it, the failure to consent to a search of the car) can be used for the limited purpose of impeachment at the trial; the pivotal question here is whether the assertion of these rights is inconsistent with innocence.

In *Grunewald v. United States*, 353 U.S. 391, 415-424 (1957), this Court *expressly* held that a prior assertion of the right of silence was not inconsistent with a later assertion of innocence (*Id.*, at 423-424). Other cases approving this approach have made the

additional point that an accused cannot be penalized for exercising his right of silence (*Fowle v. United States*, 410 F 2d 48 [1969]), and that a comment on an accused's failure to speak out at the point of arrest, or while in custody operates to punish him for availing himself of the right of counsel. *Fagundes v. United States*, 340 F 2d 674, 677-678 (1965). *Cf.*, *United States ex rel Macon v. Yeager*, 476 F.2d 613 (1973).

Given these holdings, it is apparent that *Harris v. New York* simply does not apply to our petitioners' cases. But even this is not all. Simply holding that *Harris* is inapplicable to these facts is only the short answer. This is so because the position taken by the Ohio Court of Appeals on this point is intrinsically unsound for other cogent reasons, not the least of which is the fact that even if reliance on these rights was inconsistent with innocence, and that such could be shown for the limited purpose indicated by the Court of Appeals, the fact that no limiting instructions were given must be regarded as a factor sufficient to dissipate any harmless error contention that may subsequently surface.

Surely then this Court will maintain its view that silence following an arrest is not inconsistent with innocence, being rather the simple exercise of a right to which all are entitled without qualification. In our view, if this is not the case then the *Miranda* warnings should be changed so as to inform an accused not only that he has the right of silence and to counsel, and that if he waives them anything he says can be used against him, but that if he fails to waive such rights this too can be used against him. *McCarthy v. United States*, 25 F 2d 298 (1928), cited with approval in *United States v.*

McKinney, 379 F.2d 259, at 262 (1967). Also see *Gillison v. United States*, 399 F.2d 586 (1968).

On the other hand, even if *Harris* were applicable, and it was proper for the prosecutor to impeach defense testimony by prior inconsistent statements or acts, surely this purpose was not served by questions which ask (these petitioners in their respective cases) the accused if he told police his defense when arrested, why such defense was not revealed at the preliminary hearing (where they appeared with counsel), and why he did not reveal his version of the facts at any time prior to his trial. In our judgment, none of these facts, and the resultant inferences were contradictory to the defense raised or the testimony given.

Despite all this, the rationale of *United States v. Russell*, 332 F Supp 41 (1971), and *United States v. LaVellee*, 471 F 2d 123 (1972), was also offered in the Briefs below, as support for the State's argument. Like the other cases relied on by the State – that is, *United States v. Ramirez*, 441 F.2d 950 (1971), and *United States ex rel. Burt v. New Jersey*, 475 F.2d 234 (1973) – these too are inappropriate for consideration here for the reasons given above.

In any event, the Court of Appeals here, without a citation to any authority or precedent (there were two cases cited in the entire Opinion), at least inferentially reasoned that in Ohio our prosecutors are privileged to cross examine the accused "in such a manner as to demonstrate he had not told. . . [his] story at the first or other earlier opportunities." (A 55 and 61). So structured, what the Court must be saying is that even though an accused is advised in accordance with the *Miranda* concept, if he exercises any of the options

given him, save and except making a statement, he does so at the peril of being impeached thereby should he ever testify.

We contend not only that it was violative of due process to allow these questions and the resultant inferences; it also violated "elementary fairness." See *Johnson v. United States*, 318 U.S. 189, at 197 (1943). The same is true of the arguments and comments made by the prosecutor in his successful quest for these convictions. See *United States v. Nolan*, 416 F.2d 588 (1969).

II.

As to the contention made by these petitioners that it was improper to question their defense witness as to why "he did not protest his innocence earlier than at the trial. . . [and for the prosecutor to then] argue this point to the jury"; the position taken by the Ohio Court of Appeals was that such questions were proper as bearing "upon the credibility of the witness" (A 55), and its use for such "limited purpose" was not error (A 55-56). It was also that Court's view these matters "were not improperly argued to the jury" (A 8).

The trial court, in denying petitioner Wood's post-trial motion for judgment of acquittal, expressed the conclusion that "there are different rules that apply to a witness than to a defendant" (A 42). While this is doubtless true, it is likewise true that any distinction as to the propriety of these questions based on whether they were addressed to the accused *or* to his witness (if the arguments made above are valid) simply cannot

survive Constitutional scrutiny. For surely it must be that having indicated to the witness that he too would not be penalized if he chose to remain silent the right of the accused to the benefit of such witness' evidence should not be impermissibly weighted, or otherwise compromised, by any resultant right of the State to disclose to the jury the fact that these Constitutional rights were exercised.

Viewed from still another posture, the outer limits right to impeach, by showing prior inconsistent conduct, is the same. This is so, in our judgment, whether the person whose evidence is sought to be impeached is the accused or merely his witness. Hence, the apt test, as to whether a mere witness' silence was inconsistent with his trial testimony involves a consideration of the same factors that would apply to the accused. *People v. Storr*, 527 P.2d 878 (Colo. 1974). Thus, it should suffice here simply to say that silence under the facts here as well as a refusal to consent to the search of the car; whether such silence, or refusal, was exercised by the accused as the accused, or as a witness creates congruent inferences.

For these reasons, and based on the arguments made above, the contentions made here are submitted as being controlling. Further (and for the same reasons), this Court should feel compelled to declare that the Constitution forbids the prosecution from improperly using, to the State's advantage, the fact that a witness (whose right to avail himself of counsel and of the privilege against self incrimination is equal to that of an accused) elected to stand on such rights until called upon to testify.

CONCLUSION

The convictions here seem so obviously to be based prejudicial inferences, which were created and urged upon jury as valid contentions. On the other hand, while the various rulings made below fail to supply even a logical position for their vindication, the decision of *United States v. Hale, supra*, to which critical reference has been made, should be determinative. If not this, then the conclusion expressed therein should be viewed as also being required by the Constitution.

RELIEF

For all of the reasons argued above, the judgments here under review should be reversed and these cases remanded to the Ohio Court of Appeals for the appropriate dispositions.

Respectfully submitted,

JAMES R. WILLIS, ESQ.
1212 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
216/523-1100

Attorney for Petitioners

NOS. 75-5014 and 75-5015

In the Supreme Court of the United States

OCTOBER TERM, 1975

JEFFERSON DOYLE, PETITIONER

v.

THE STATE OF OHIO, RESPONDENT

and

RICHARD WOOD, PETITIONER

v.

THE STATE OF OHIO, RESPONDENT

On Writ of Certiorari To The Court Of Appeals Of Ohio, Tuscarawas County

BRIEF FOR THE STATE OF OHIO

RONALD L. COLLINS
Prosecuting Attorney for
Tuscarawas County, Ohio
Court House
New Philadelphia, Ohio
44663

GORDON PRINTING — STRASBURG, OHIO 44680 — TELEPHONE (216) 878-5313

INDEX

TABLE OF AUTHORITIES CITED

Cases

Constitution, and statutes

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

Nos. 75-5014 and 75-5015

JEFFERSON DOYLE, PETITIONER

v.

THE STATE OF OHIO, RESPONDENT

and

RICHARD WOOD, PETITIONER

v.

THE STATE OF OHIO, RESPONDENT

On Writ of Certiorari To The Court of Appeals Of Ohio, Tuscarawas County

---

BRIEF FOR THE STATE OF OHIO

I QUESTIONS PRESENTED

A. May a defendant take the witness stand at trial and commit perjury with impunity by testifying to an exculpatory story blatantly inconsistent with his silence at the time of his arrest and not be sub-

jected to impeaching cross-examination as to:

1. his silence
   a. at the time of his arrest,
   b. at his preliminary hearing,
   c. or at any point before trial;
2. his refusal to consent to a search of his car?

B. May a prosecutor properly argue to the jury that such a defendant has been successfully impeached as a witness because of his silence which was blatantly inconsistent with his exculpatory trial testimony?

C. May a co-defendant, tried and convicted separately for the same offense, take the stand as a witness for his accomplice and commit perjury with impunity by testifying to an exculpatory story blatantly inconsistent with his silence at the time of his arrest and not be subjected to

impeaching cross-examination as to his silence:

1. at the time of his arrest,
2. at his preliminary hearing,
3. or at any point before trial?

D. May a prosecutor properly argue to the jury that such a witness has been successfully impeached because of his silence which was blatantly inconsistent with his exculpatory trial testimony?

II STATEMENT OF THE CASE

A. The Facts of the Offense.

In order for this Court to appreciate the posture of the case which presents such questions, a rather full statement of the facts must be set forth.

The Multi-County Narcotics Bureau is a law enforcement agency enforcing the laws against illicit drug traffic in Tuscarawas County, Ohio (Wood R. 107, Doyle R. 250).

On April 28, 1973, this law enforcement agency received word from one of its in-

formants that he had set up a deal to purchase 10 pounds of marijuana from the defendants. The defendants wanted $175.00 a pound, or $1,750.00 for the 10 pounds (Doyle R. 157).

There was a frantic rush to gather the money in time. Only $1,320.00 could be gathered, but part of this currency was photocopied so that the serial numbers of the bills could be recorded (Wood R. 40, Doyle R. 158).

The informant and his vehicle were searched by Multi-County agents. Then he was given the money and went off to his rendezous with the defendants at the Cloverleaf Bar in Dover, Ohio. Since the Cloverleaf Bar was too crowded to talk business, they went across the street to another bar where the bargain was struck (Wood R. 41, 42, Doyle R. 161, 162).

The defendant Doyle then went to get the marijuana while the defendant Wood

stayed with the informant who drove to the nearby city of New Philadelphia, eventually winding up in a parking lot behind a bar called the 224 Club (Wood R. 42, Doyle R. 162). The defendants told the informant that Wood was staying with him so that he could not report the transaction to the authorities (Wood R. 43, Doyle R. 163).

The defendant Doyle rejoined them in the 224 Club parking lot after flashing his lights as a signal. There, the exchange took place. The defendants gave the informant the marijuana, and he gave them the money (Wood R. 44, Doyle R. 164).

Now during this entire time, the defendants and the informant were under surveillance by a group of law enforcement officers from the Multi-County Narcotics Bureau, the Dover Police Department, and the Tuscarawas County Sheriff's Department (Wood R. 116, Doyle R. 260). One of these officers, Captain--now Chief--Griffin, of

the Dover Police Department, saw the transfer in the parking lot of the 224 Club and testified at trial to that effect (Wood R. 266, Doyle R. 345).

When the defendants were picked up, they were advised of their *Miranda* rights (A. 4, 20) and asked to give consent to have their car searched. They refused (A. 4, 5, 6, 20, 21, 22). Then police officers secured a search warrant (A. 5). Sure enough, upon execution of the search warrant, there was the money which had been photocopied wadded up under the floor mat on the passenger side (Wood R. 134, 135, Doyle R. 275).

B. TRIAL

1. The Defendants' Story.

On completion of the state's case-in-chief, the defendants took the stand. After having discovered the state's case, and listened to the state's witnesses at

the preliminary hearing (A. 27, 31) and at trial, they concocted a story about a frame--a bizarre, exculpatory story blatantly inconsistent with their silence at the time of their arrest.

According to them, Doyle *had* indeed contacted the informant about a drug deal (Wood R. 377, Doyle R. 468), but he wanted to *buy* marijuana from the informant, not sell it (Wood R. 384, Doyle R. 470). Wood, who was along just for the ride so that he could visit his daughter in Steubenville (Wood R. 439, Doyle R. 434), didn't hear any of the details of the negotiations because he was ogling a go-go girl (Wood R. 384).

Wood's explanation for Doyle's using Wood's car was: "Jeff asked if he could use the car to go get his old lady--or excuse me, his wife..." (Wood R. 440). Little did he know Doyle's true reason was to gather enough money--together with a small

loan of nearly $1,000.00 from Wood--to buy ten pounds of marijuana from the informant (Wood R. 385, Doyle 224). Nevertheless, he compliantly rode to a second location in the informant's pickup truck while his scheming friend had his new, leased Cutlass (Doyle R. 435).

During his drive to get the money, Doyle was suddenly smitten by conscience. He said to himself, said he, "What am I going to do with ten pounds of marijuana?" (Wood R. 387, Doyle R. 471).

Returning to the previously-appointed meeting-place in the parking lot of the 224 Club, an apprehensive Doyle vacillated among conflicting feelings of buying only one pound, or the whole ten pounds because the informant would be "mad," or two pounds (Doyle R. 473, 474). Nonetheless, the informant went away "mad" with his sack full of 10 pounds of marijuana since he wanted an all-or-none deal. Wood, who had been

patiently waiting in the informant's pick-up truck while Doyle turned down the informant's deal, now leisurely returned to his own car as a passenger and was awe-stricken to discover a wad of money in the back seat (Wood R. 388).

Both immediately smelled some kind of frame or set-up even though Wood didn't know anything about what was going on. They almost simultaneously agreed to chase the informant around several blocks of New Philadelphia "to find out what was going on" (Wood R. 389, 443, Doyle R. 436, 476, A. 10, 22). Even so, Wood felt it was prudent to hide the money under the floor mat (A. 6). At one point during this chase, Doyle pulled over and stopped to explain to Wood what had been happening (Doyle R. 477), or to count the money (Wood R. 391), depending from which trial you take Doyle's testimony. In the Wood trial (which was earlier) Doyle said that Wood was not aware

of what was going on even after they were stopped by authorities (Wood R. 391).

Thus, the story of the defendants gained plausibility by meshing with details law enforcement officers could testify to, details that the defendants could freely admit without actually confessing to the critical elements of the crime. For example, defendants could hardly safely deny that they had hidden the marked money under the floor mat because, after all, police officers had found it there, hadn't they? Of course, the defendants had a ready explanation for hiding the money. It is an old defense technique.

2. Cross-examination of Defendants.

The prosecutor, faced with this fantastic, yet arguably plausible, story, *had* to attack vigorously both it and the credibility of those who had told it.

This he did in a long series of questions designed to show that the jury was being given a recent fabrication by the defendants.

One method of attack upon the defendants' credibility chosen by the prosecutor was to cross-examine them about their silence at the time of their arrest (A. 6-14, 22-31).

It didn't turn out to be quite silence. Doyle's response to his being placed under arrest for sale of marijuana, by his own testimony, was: "I didn't know what he was talking about," or "What's this all about?" (Doyle R. 479, A.12). Wood testified that he did indeed protest his innocence (A. 31).

At any rate, part of the defendants' explanation for their silence at the time of their arrest was that they wanted to get legal advice before they said anything (A. 25). "...I didn't have nobody there

to help me answer the questions...If I started, I don't know where I would have stopped" (A. 26).

If that was the only explanation, then, after having consulted an attorney, indeed after being represented by one at the preliminary hearing, they could have given their exculpatory stories to law enforcement authorities. This they did not do (A. 27).

The prosecutor did not pussyfoot. The issue here is raised strongly in unequivocal terms. (For example, "Wouldn't that have been a marvelous time to protest your innocence?" (A. 26). A safer approach would have been to couch the questions in terms such as, "Have you ever offered this explanation to anybody else?" But the prosecutor did not choose to be safe; he knew he was right.

III ARGUMENT

A. SUMMARY

It seems to me that a rule of law cannot be considered in a vacuum. It must be regarded as to how it will affect the actual facts of real cases. That is why so many of the facts have been set forth in this brief. Perhaps, too, that is why some argument has crept into my presentation of the facts and that some facts will find their way into the argument.

The Respondent's position, simply stated, is that a prosecutor has just as much right to ferret out perjurers by vigorous, impeaching cross-examination as defense attorneys or attorneys in civil matters and that nothing in the Constitution of the United States prevents the kind of cross-examination petitioners here complain of.

The argument below might be viewed as a kind of syllogism:

1. Nothing in the Constitution prevents a criminal defendant who chooses to testify in his own behalf from being impeached by his own inconsistent acts and statements.

2. Silence at the time of arrest and at preliminary hearing can be such an act.

3. Therefore, a criminal defendant may properly be asked questions about his silence at the time of his arrest and at the preliminary hearing, during cross-examination for the purpose of impeaching his testimony *when his silence was inconsistent with his trial testimony.*

B. THE CONSTITUTION

An appropriate starting place for this inquiry is the Constitution. The only conceivable part of it which has any relevance is that part of the Fifth Amendment which says, "No person...shall be compelled in any criminal case to be a witness against himself..."

What do those words mean?

It seems that every constitutional law case could be viewed as an exercise in constitutional interpretation and construction, a striving to give life to those original precious phrases.

Therefore, when I look at the quotation from the Constitution above, the word which stands out and cries for interpretation and application is *compelled.*

Indeed, early cases in this area were directed against obvious abuses of governmental compulsion against individuals (*E.g., Brown v. Mississippi*, 297 U.S. 278 (1936). A sampling of coercive factors this Court has considered since would include incommunicado detention, *Haynes v. Washington*, 373 U.S. 503 (1963); threats, *Lynumn v. Illinois*, 373 U.S. 528 (1963); physical deprivation of sleep or food, *Reck v. Pate*, 367 U.S. 433 (1961); limits on access to friends or attorneys, *Crooker v. Californ-*

ia, 357 U.S. 433 (1958); fear of mob violence, *Payne v. Arkansas*, 356 U.S. 560 (1958); and extended or repeated interrogation, *Chambers v. Florida*, 309 U.S. 227 (1940).

Later cases focus upon the psychological coercion of the custodial atmosphere *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964).

This brief historical examination and scrutiny of the text of the Constitution itself lead one to the inescapable conclusion that there must be some sort of *compulsion*, some sort of *compelling* present to run counter to the constitutional prohibition. When a person voluntarily blurts out a threshhold confession before a law enforcement officer can advise him of his rights, men of sense realize that no constitutional violation has occurred and that such evidence should not be excluded because there was no element of compulsion.

In *Miranda, supra*, Chief Justice Warren, at page 478, said:

> There is no requirement that police stop a person who enters a police station and states that he wishes to confess a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

Was there any compulsion in the instant case?

First, there was none at trial. The defendants took the stand presumably upon the advice of able counsel, but undoubtedly of their own free will and choice (Wood R. 370, 371 where a colloquy, out of the hearing of the jury, occurs in which the trial judge ascertained that the witness Doyle was making an informed choice to testify despite the fact that his trial was to be held yet). They knew full well, or should have, that they were subjecting themselves to a searching cross-examination.

Nor was there any compulsion of the defendants to remain silent at the time of their arrest. To view the gentle and benevolent advice of the *Miranda* warning as compulsion seems to be stretching a point dangerously thin. To be sure, law enforcement officers advised defendants of their *Miranda* rights, including the right to remain silent. But they did not *force* the defendants to remain silent. To harken back to the early cases cited above, an absurd picture comes to mind of law enforcement officers' twisting the defendants' arms and saying, "Don't you dare say anything!" No, the decision of the defendants to remain silent at the time of their arrest was again the product of their own free will and choice.

C. THE PROBATIVE VALUE OF SILENCE

1. The Meaning of Silence.

Does silence mean anything?

The great American poet, Edgar Lee Masters, in a poem named *Silence*, wrote, in part:

> I have known the silence of...
> ...a man and a maid, ...
> And the silence of the sick
> When their eyes roam about the room
> And I ask; For the depths
> Of what use is language?
> A beast of the field moans a few times
> When death takes its young:
> And we are voiceless in the presence of realities--
> We cannot speak.

The Respondent commends a reading of the entire poem, *Silence*, to the Court. It can be found in the book *Songs and Satires* published by the Macmillan Company in 1916, among other places. The poet's point, of course, is that a person often expresses himself or communicates far more effectively by remaining silent rather than by saying anything in mere words.

Anybody who doubts that silence has meaning should enter the locker room of an athletic team after it has lost an important competition. He should observe lovers looking into each other's eyes after a long separation.

2. The Interpretation of Silence

a. In the Prosecution's Case-in-Chief

While we may all agree that silence can have meaning, can express things, can communicate, the difficulty comes in when we try to say what the silence means. Concededly, silence is often ambiguous. That is why the rule against prosecution use of silence in its case-in-chief makes sense. There is great danger in using silence as evidence of guilt. In that area its probative value is so small, because of its ambiguity, that it should be excluded as a matter of law. Such a wise rule of evidence could only become a matter of consti-

tutional law through the procedural due process requirements of the Fifth and Fourteenth Amendments, but not through the self-incrimination part.

b. In Impeaching Cross-Examination

It is quite another matter where a criminal defendant intervenes with a volunteered exculpatory version at trial.

Here arises a line of cases, distinct from the line culminating in *Miranda*. This second line of cases deals with varying aspects of cross-examination of defendants who take the stand in their own behalf and it culminated in *United States v. Hale*, -- U.S. -- (June 23, 1975).

The beginning point is *Raffel v. United States*, 271 U.S. 494 (1926). In *Raffel*, a defendant took the stand in his second trial. The first trial had resulted in a hung jury. At that first trial he had not offered himself as a witness to refute a government

witness's testimony in regard to an admission of ownership. At the second trial, he did. Upon cross-examination, the government asked, "Did you go on the stand and contradict anything they said?" The answer was, "I did not." Then he was asked, "Why didn't you?" The response was, "I did not see enough evidence to convict me."

The Court held that it was not error to require the defendant Raffel, offering himself as a witness upon the second trial, to disclose that he had not testified as a witness in his own behalf upon the first trial.

Next came *Grunewald v. United States*, 353 U.S. 391 (1957). There, a defendant had been called to Grand Jury and refused to answer certain questions. When he took the stand and answered those same questions in an exculpatory way at trial, the government, on cross-examination, exacted disclosure of his earlier failure to answer the questions.

The Court held that under the circumstances of the case as presented, the earlier silence of the witness was *consistent* with his trial testimony, and therefore the trial court had erred in permitting impeaching cross-examination as to his earlier silence.

The *Grunewald* opinion specifically declined to overrule *Raffel*.

Then came *Harris v. New York*, 401 U.S. 222 (1971). *Harris* held that the prosecution could impeach a defendant who took the stand and testified as to exculpatory facts inconsistent with an earlier statement, even though the earlier statement was obtained in the absence of *Miranda* warnings, and therefore coerced.

At page 225 of *Harris*, the Court said,

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury.... Having voluntarily taken the stand, petitioner was under an obligation

> to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process.

And, at page 226, the Court went on to say:

> The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.

Finally, in *Hale*, *supra*, a defendant was cross-examined as to why he had not offered his trial explanation as to the money in his possession at the time of his arrest.

The Court held the questioning was improper because there was no probative value to his earlier silence to show it inconsistent with his trial testimony.

c. The Threshhold Question

The teaching of these cases is that the trial judge, as arbiter of the law, must decide whether the trial testimony of the defendant is inconsistent with his silence at the time of his arrest. If it is not

inconsistent, the evidence goes out as a matter of law, having failed the balancing test announced in *Grunewald*, and followed in *Hale*.

In *Hale*, Justice Marshall, writing for the Court, said:

> If the Government fails to establish a threshold inconsistency between silence at the police station, and later exculpatory testimony, at trial, proof of silence lacks any significant probative value and must therefore be excluded.

Inferentially, then, the converse must be true. If the prosecution *does* establish a threshhold inconsistency, then silence *has* significant probative value and may be admitted into evidence.

Support for this view can be found in the Court's reconciliation of *Hale* with *Raffel v. United States*, *supra*. "The Raffel Court found that the circumstances of the earlier confrontation naturally called for a reply."

This is exactly the rationale of the Court in *United States ex Rel. Burt v. New Jersey*, 475 F. 2d 234 (Third Cir. 1973). There, a person arrested for breaking and entering said nothing to police about a murder he had committed earlier in the day. When tried for the murder, the defendant took the stand and testified that the shooting had been accidental. On cross-examination, he was asked why he had said nothing to police about the accidental shooting or seek any aid for the victim when he was picked up for breaking and entering.

In *Burt, supra*, Judge Rosenn, in a concurring opinion, which Respondent commends to this Court as well-reasoned, effectively answered Petitioners' misplaced reliance on *Miranda, supra*, and *Griffin v. California*, 380 U.S. 609 (1965).

Cross-examination was also allowed in *United States v. Ramirez*, 441 F. 2d 950 (Fifth Cir. 1971) *cert. denied*, 404 U.S.

869, *reh. denied* 404 U.S. 987, because it would have been natural for the defendant to reply under the circumstances of a confrontation at arrest. There, the defendant asserted a defense of coercion at trial --unidentified strangers in Mexico were making him sell heroin. He had, in fact, wanted to be arrested so that he could stop pushing drugs. *But*, he neglected to communicate his relief to law enforcement officers at the time of his arrest.

Relying heavily on *Harris*, the Court said, at page 954:

> The analogy of *Harris* to the case at hand is inescapable. Once Ramirez elected to testify and assert the defense of coercion he became subject to the "traditional truth-testing devices of the adversary process", including the right of the prosecution to show his prior inconsistent act of remaining silent at the time of his arrest. Thus, the district court was not in error in allowing the government to cross-examine Ramirez about his silence.

d. Application to Our Facts

It would be difficult to imagine a factual context other than the one set out in our case above where it would be more natural for the defendants to speak up at the time of their arrest if their exculpatory story were true.

Disclosure would have been natural first because the defendants could have expected an early release from custody. Respondent realizes that this ground was rejected in *Hale, supra*. But perhaps that rejection was made without consideration of certain language in *Miranda*, itself. At page 482 of *Miranda*, Chief Justice Warren, writing for the Court, said:

> When police inquiry determines that there is no reason to believe that the person has committed any crime, it is said, he will be released without need for further formal procedures. The person who has committed no offense, however, will be better able to clear himself after warnings with counsel present than without. *It can be assumed that in such circumstances*

> *a lawyer would advise his client to talk freely to police in order to clear himself* [Emphasis added].

Thus, *Miranda* recognized, even assumed, that an innocent accused would come forward when it was in his enlightened self-interest to do so.

An additional incentive for the defendants to offer their exculpatory explanation at the time of their arrest was that by doing so they could aid authorities in bringing wrongdoers (that is, the people who had framed the defendants) to justice.

Again, *Miranda* finds such conduct natural. At page 478 of *Miranda*, the Court said, "It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement."

If the story of the defendants were true, then the informant had, by his conduct, committed the Ohio crimes of possession of an illegal hallucinogen (Section 3719.41 of

the Revised Code of Ohio); unlawful attempt to induce another to use hallucinogens (Section 3719.44 of the Revised Code of Ohio); and giving false information to officials (Section 2923.42 of the Revised Code of Ohio).

As the good citizens which their trial testimony proclaimed them to be, the defendants were under at least a moral obligation to report this subverter of the criminal justice system to the authorities. Only fear of complete corruption among the Dover Police Department, the New Philadelphia Police Department, the Tuscarawas County Sheriff's Department, the Tuscarawas County Prosecuting Attorney, and all other local, state, and federal officials and citizens could overcome the motive a good citizen would have in speaking up. The often-advanced risk of involvement would not apply in Petitioners' case. They were already deeply involved.

Either this, or the defendants' story at trial was a fabrication, a vicious, slanderous, perjurious fabrication.

Thus, Respondent submits that defendants' silence at the time of their arrest had great probative value as to the issue of whether their trial testimony constituted a recent fabrication.

Certainly the prosecution had a right to try to prove that the defendants' version was a lie. And the state could have done so by means of an inconsistent statement obtained in violation of *Miranda* (*Harris, supra*) or with evidence otherwise unavailable in its case-in-chief, or by direct evidence such as a confession of falsehood, *if such was available.*

e. Probative Value v. "Prejudicial Impact"

As was referred to above, *Grunewald* used a balancing test which was followed in *Hale*. Respondent feels the probative value side

of the scales has been loaded by arguments above concerning threshhold inconsistency, facts showing the bizarre nature of the trial testimony, and common sense expectation of disclosure of the exculpatory explanation, if there was one. Against this, must now be matched what the Court has referred to as "the prejudicial impact."

In doing so, it seems to me, that care must be taken to avoid the error of equating the term *prejudicial* with *damaging*. There is no doubt that evidence of the defendants' silence at the time of their arrest was *damaging* to them. But it never has been grounds for exclusion of evidence that it hurts. If so, conviction of any criminal defendant would be an impossibility.

As a matter of fact, Respondent feels that the use of the term *prejudicial* is imprecise. There is nothing in the Constitution or elsewhere, which says, "Prejudi-

cial evidence shall not be introduced." In a sense, direct eyewitness testimony or evidence of a proper confession is "prejudicial" to the case of a defendant. But it is "proper prejudicial" evidence.

To say that evidence of no probative value has *a* prejudicial effect on a jury appears to be a contradiction in terms. The weightier arguments become to show that silence has probative value, they defeat their own purpose because these same arguments tend to show "prejudicial impact." Conversely, if the prosecution convinces a court that the "prejudicial impact," of such evidence is slight, he has probably convinced that same court that such evidence has slight probative value. It seems unfair to cast the prosecution upon the horns of such a dilemma. A more accurate expression might be that certain evidence has a "prejudicial" effect *because it has probative value.*

f. The Conduct of Petitioners' Attorney

There is a further reason for suggesting that impeaching cross-examination about silence when it would be natural not to remain silent is proper. Petitioners' attorney himself thought it was! In the trial of the very case before this Court, Petitioners' attorney sought to show the testimony of a state's witness to be false or a recent fabrication by cross-examining him as to his silence about his testimony before trial.

The Defendant Doyle was asked on cross-examination about a conversation he had with a law-enforcement officer after his arrest. He gave his version of the conversation. On rebuttal the prosecution called the law enforcement officer who gave a different version of the same conversation (Wood R. 486-489). Suprised by this, Petitioners' attorney cross-examined by asking

the following questions:

1. "Did you record anywhere in writing this conversation that you have related to us today?" (Wood R. 497).

2. "And it is also fair to say you didn't tell the prosecutor before August 31, the day he filed his answer?" (Wood R. 497).

3. "Now Mr. Beamer, don't you think it a bit unusual that you did not record a resume of these conversations in writing shortly after their occurrence?" (Wood R. 498).

4. "Why didn't you tell the prosecutor that night?" (Wood R. 501, line 2).

5. "Why didn't you tell the prosecutor that night?" (Wood R. 501, line 4).

6. "Why didn't you tell him the man confessed?" (Wood R. 501).

7. "Since you agree it is an admission or a confession, why didn't you tell it to the prosecutor?" (Wood R. 501).

8. "Why didn't you tell him that morning or as soon as you could get to him?" (Wood R. 501).

Thus, the defendants' attorney resorted to the very cross-examination technique he complains about.

D. CONCLUSION

Prosecutors need to have the impeaching tool they thought *Harris v. New York, supra,* had given them as a weapon against perjury. What else can a prosecutor do when faced with exculpatory trial testimony of defendants which is blatantly inconsistent with their conduct at the time of arrest? How else can he impeach such trial testimony? If he cannot impeach the teller of the story, the only other thing he can do is to swallow it, allow the story to go unchallenged to the jury.

Part of the reason for *Mapp v. Ohio,* 367 U.S. 643 (1961), and *Miranda, supra,*

was to deter improper or unlawful police activity. Indeed, use of illegally-seized evidence or improperly-obtained confessions has been allowed for purposes of impeachment on cross-examination *Harris, supra; Walder v. United States,* 347 U.S. 62 (1954). It seems strange to form a more stringent rule where, as here, police conduct has been thoroughly proper.

In *Walder,* the Court said, at page 65:

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the Weeks doctrine would be a perversion of the Fourth Amendment.

Respondent suggests that allowing the exculpatory story of Petitioners Doyle and Wood, defendants below, to go to the jury unchallenged would be a similar perversion of the Fifth Amendment.

Therefore, Respondent submits that the questions presented at the beginning should be answered: A. No, B. Yes, C. Emphatically no, and D. Yes.

Question C.'s answer comes in for especial emphasis because whatever shields a defendant may claim at trial, his accomplice, who has been given, or is going to be given, a separate trial, has even less claim to these privileges.

In short, when the procedure complained of here is laid beside the Constitution, there is no conflict. When the exculpatory story of the defendants is laid beside their silence at the time of their arrest, under the circumstances of this case, there is great conflict.

Respondent respectfully submits that this Court should take one of the courses of action given below:

1. Dismiss the case, the writ of certiorari having been improvidently granted.

This would be an appropriate course, Respondent feels, because in order to sustain Petitioners' position this Court must hold that evidence of defendants' silence, at the time of arrest, regardless of its consistency or inconsistency, is of so little probative value that it should be excluded as a matter of law--constitutional law at that.

Respondent believes the Constitution requires no such thing.

2. Affirm the decision of the Ohio Court of Appeals for Tuscarawas County, Ohio.

Selection of the second course of action would, of course, require some formulation of a rule of law.

While it would undoubtedly be easier to state a rule of law which would apply to criminal defendants as guilty as Petitioners, the duty of this Court would appear

to be to frame a rule which can be fairly applied to innocent and guilty alike.

Respondent therefore suggests this rule: When defendants' voluntary testimony reveals that it would not make sense for them to remain silent at the time of their arrest, cross-examination about this behavior which is inconsistent with their trial testimony may properly be made.

Respondent realizes that this kind of rule would lead to consideration at the trial level of each situation on a case-by-case basis. But that is consonant with footnote 7 in *Hale, supra*, where it is pointed out that consistency or inconsistency as a matter of law is uniquely in the discretion of the trial court.

The trials of these defendants were characterized by fairness, an even-handed fairness which drove toward twin desirable goals for the American adversary system. These trials assisted the jury in its pri-

mary aim--the ascertainment of truth. There is no reason to suppose a fair trial results when triers of fact are only given part of the truth, or a lop-sided version of the truth. Finally, somebody in the trial below was not telling the truth. The jury resolved this perjury issue against the defendants. Perjury is an act particularly insidious to the American system of criminal justice. This is so because it relies so heavily on witnesses who are sworn to, and it is assumed, *do* tell the truth. Whatever steps the criminal justice system can take against this monstrous evil, it should take.

Respectfully submitted,

RONALD L. COLLINS
Prosecuting Attorney for
Tuscarawas County, Ohio
Court House
New Philadelphia, Ohio 44663

Attorney for Respondent

IV APPENDIX

Section 2923.42 Ohio Revised Code. Giving False Information to Officials.

No person shall knowingly give or assist in giving a false or fictitious call or report to the state highway patrol or to any police department, fire department, sheriff, constable, or other law enforcement officer, or to any person dispatching or operating an ambulance or other emergency vehicle with intent to mislead, misdirect, or improperly summon said officer or person.

...

Whoever violates this section shall be fined not more than one thousand dollars or imprisoned for not more than one year or both.

Section 3719.41 Ohio Revised Code. Purchase, Possession, or control.

No person shall, with intent to produce hallucinations or illusions, purchase, use, possess, or have under his control an hallucinogen...

Section 3719.44 Ohio Revised Code. Prohibitions.

No person shall:

(C) Induce or attempt to induce another person to unlawfully use or administer any hallucinogen...

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-5014 & 75-5015

JEFFERSON DOYLE,

Petitioner,

v.

STATE OF OHIO,

Respondent,

and

RICHARD WOOD,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON WRITS OF CERTIORARI TO THE
COURT OF APPEALS OF OHIO, TUSCARAWAS COUNTY

PETITIONERS' REPLY BRIEF

JAMES R. WILLIS, ESQ.
1212 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
216/523-1100

Attorney for Petitioners

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-5014 & 75-5015

JEFFERSON DOYLE,

Petitioner,

v.

STATE OF OHIO,

Respondent,

and

RICHARD WOOD,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON WRITS OF CERTIORARI TO THE
COURT OF APPEALS OF OHIO, TUSCARAWAS COUNTY

PETITIONERS' REPLY BRIEF

In this case the lines are clearly drawn. The State here contends, without equivocation, that it is not only

proper to cross examine a *Miranda* advised defendant as to his unwillingness to engage in a discussion with his arresting officers, but that such an examination is required (*Respondent's Brief*, p. 10) because "what else can a prosecutor do when faced with exculpatory trial testimony of defendants" who chose to remain silent following their arrest (*id*, p. 36). As to this, the fact that Respondent is willing to fully credit petitioners' version of their participation in this episode, as being an "arguably plausible, story" (*ibid*), emphatically portrays the extent to which Respondent would have his reasoning patterns carry this Court.

While Respondent seems quite comfortable in suggesting that this Court's rejection (in *United States v. Hale*) of significant segments of his argument may have been "made without consideration of certain language in *Miranda*, itself" (*Respondent's Brief*, p. 28), other aspects of its Brief are equally startling–if such is possible.

As to this latter point, it may suffice here to simply note, by way of illustration, Respondent still contends that given the forced explanation made by these petitioners–that "they wanted to get legal advice before they said anything" (*id*, p. 11)–the failure to furnish the substance of their later testimony after counsel was obtained became an additional incriminating circumstance. Here Respondent pointedly contends the fact that petitioners' exculpatory defense was not revealed at the preliminary hearing created a further *right* in the prosecutor to specifically ask them "wouldn't that have been a wonderful time to protest your innocence" (*id*, p. 12).

Granted, "a prosecutor has . . . [a] right to ferret out perjurers by vigorous, impeaching cross-examination"

(*id*, p. 13), but it simply does not follow that this authorizes the prosecutor to compromise fundamental rights protected by the Constitution and the decisions of this Court implementing those rights.

Looking then at the basic contentions made by the Respondent, distilled the position seemingly taken is that the assertion of either the right of silence or the right to confer with counsel following an arrest, or both of them, must be regarded as inconsistent with any exculpatory trial testimony by an accused. Further, that such assertions are circumstances that can be dramatized (in cross examination and argument) as being inconsistent with innocence. It is then reasoned that this is true whether the person being cross examined is a witness or a defendant.

While this Court's decision in *United States v. Hale*, must be regarded as forging a pattern that will have an easy application to state court prosecutions; still the efficacy of our contention that surely this "Court's power as final arbiter of issues raised under the Constitution" is at least as sensitive to the requirements of due process as is the Court's " 'supervising authority over lower federal courts' " (*Brief for Petitioners*, p. 25) is beyond dispute.

Again, Respondent almost aggressively finds solace in still another suggestion made in *Miranda*. Here reference was made to the observation in that opinion to the fact that there are circumstances where it can be assumed a lawyer will advise his client to talk freely with the police (*Respondent's Brief*, pp. 28-29). In urging even this point, it is apparent counsel has chosen to ignore what can be regarded as an essential aspect of *Miranda*. Simply put, this Court there concluded that:

> "In accord with our decision today, it is impermissible to penalize an individual for exer-

> cising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." 384 U.S., at 468, n. 37.

Surely then, this Court will still agree, and find here, that these petitioners were penalized both by being asked, and by being forced to answer, questions dealing with this impermissible area. In our judgment, this certainly makes their case even stronger then *Hale*, where the Court interrupted the questioning and informed the jury they could disregard "the question", which inferentially included the implication that naturally flowed therefrom. In both of the cases here the questions were answered and the points argued.

Viewed from still another posture, as was held in *Johnson v. Patterson*, 475 F.2d 1066 (10th Cir. 1973), "it would indeed be irregular and anomalous to warn an accused he has a right to remain silent, that if he says anything it may be used against him, however, if he does remain silent that too may be used against him . . . . This [however] would be the practical effect of allowing the prosecution to use at trial the fact that the accused remained silent, clearly making the assertion of the constitutional right costly" (475 F.2d, at 1069).

The logic behind the above analysis applies full force, we contend, whether the person who avails himself of the *Miranda* advice testifies as a mere witness or as the accused.

II

On the other hand, while the question directed to these petitioners, as to why they would not consent to the warrantless search of the car, may not be governed by *Miranda;* the fact that petitioners were asked to consent to the search certainly implied they were being given a choice in the matter. This added dimension creates a factor which must be reckoned with.

By way of analogy, it is most doubtful that even this prosecutor would argue that the unwillingness of a tenant to submit to a warrantless search of his premises creates an evidentiary advantage for the prosecution. This same principle should apply to the search of movable property as well.

Still another faulty syllogism constructed by the Respondent is premised on the statement that even though the "officers advised defendants of their *Miranda* rights, including the right to remain silent . . . they did not *force* the defendants to remain silent" (*Respondent's Brief*, p. 18). So postured, the conclusion is then drawn that this shows the decision to remain silent was "their own free choice" (*ibid*), therefore, evidence showing this choice becomes relevant and permissible.

The fact that the above reasoning pattern is a *non sequitur* could not be clearer. This is so because *it does not follow* from the fact they elected to remain silent, that such election is inconsistent with innocence. Indeed, the point has been made:

> "[There are] not special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them." *Grunewald v. United States*, 353 U.S. 391, at 425-426 (1957). (Concurring Opinion.)

CONCLUSION

In this case, as was held in *Hale*, there was no reason for these petitioners to think, or for that matter to even assume, that *any* explanation by them would have hastened their release. Thus, the suggestion that these petitioners should have ignored the professional advice given them by counsel, who represented them at the preliminary hearing, at the risk of creating an adverse inference, if not asking too much of them was certainly asking too much of their counsel. This thought seems especially compelling since, until now, it had always been deemed sound advice for "any lawyer worth his salt . . . [to] tell the suspect in no uncertain terms to make no statement to the police under any circumstances" *Watts v. Indiana*, 338 U.S. 49, at 59 (1949).

Thus, we again contend, consistent with our view of the thrust of this Court's decision in *Hale*, that silence as exercised by the petitioners in this case was not inconsistent with the defense made by them to the charge for which they stood trial. The same is true of their unwillingness to waive their right to counsel and their right to follow his professional advice.

For all of these reasons, it is again urged that these convictions be reversed.

Respectfully submitted,

JAMES R. WILLIS, ESQ.
1212 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
216/523-1100

Attorney for Petitioners

Nos. 75-5014 and 75-5015

In the Supreme Court of the United States

OCTOBER TERM, 1975

JEFFERSON DOYLE, PETITIONER

v.

STATE OF OHIO

RICHARD WOOD, PETITIONER

v.

STATE OF OHIO

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OHIO, TUSCARAWAS COUNTY

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-5014

JEFFERSON DOYLE, PETITIONER

v.

STATE OF OHIO

No. 75-5015

RICHARD WOOD, PETITIONER

v.

STATE OF OHIO

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OHIO, TUSCARAWAS COUNTY

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

The United States will address the following question:

Whether the Due Process Clause of the Fourteenth Amendment (and through it the self-incrimination provision of the Fifth Amendment) bars cross-examination of a defendant in a state criminal proceeding, who has given exculpatory testimony at trial, as to why he failed to offer such information previously.

INTEREST OF THE UNITED STATES

This case presents questions closely related to those that were before this Court in *United States* v. *Hale*, 422 U.S. 171. Although the constitutional aspects of the issue presented in *Hale* were briefed at length by the parties to that case, the Court resolved the issue through the exercise of its supervisory powers over the administration of justice in the federal courts, ruling that, on the facts of that case (422 U.S. at 179), any probative value of the defendant's silence was outweighed by potential prejudice. Presumably, on different facts, a defendant's prior silence regarding the subject of his trial testimony might be deemed sufficiently probative to become a proper subject of cross-examination. Accordingly, there remains open, in federal as well as state prosecutions, the question whether inquiry into a testifying defendant's prior silence is absolutely barred from introduction in evidence on constitutional grounds.

Apart from this interest in the potential direct impact of the instant case upon future federal prosecutions, the resolution of the constitutional issues presented herein regarding the scope and impact of the privilege against compelled self-incrimination is likely to have significant application in other contexts and thus has a potential for impact upon a broad range of cases to which the United States is a party.

STATEMENT

1. After separate jury trials in the Court of Common Pleas of Tuscarawas County, Ohio, both petitioners were convicted of selling marijuana, in violation of Ohio Rev. Code § 3719.44(D) (1971). Each was sentenced to a term of not less than twenty nor more than forty years' imprisonment. The intermediate appellate court affirmed the convictions, and the Supreme Court of Ohio denied petitioners' respective motions for further review.

The evidence showed that on April 29, 1973, William Bonnell, a state narcotics bureau informant, purchased ten pounds of marijuana from petitioners.[1] Bonnell paid for the marijuana with money which had been photocopied for identification by state narcotics bureau agents. After the transaction, petitioners departed in a rented car.

---

[1] This brief summary of facts is taken from the trial transcripts and the opinion of the Court of Appeals, Fifth District, Tuscarawas County, in *Ohio* v. *Doyle*, No. CA 1108 (App. 49-57).

A short time later, local police and narcotics bureau agents stopped petitioners' car and placed petitioners under arrest. Petitioners thereupon were given *Miranda* warnings and taken to the county jail. Thereafter, petitioners refused to consent to a search of their car. A subsequent search of the car, pursuant to a valid warrant, elicited the photocopied money hidden under the front passenger-side floormat.

2. At their respective trials, each petitioner took the stand in his own defense and testified that he had been "framed" by informant Bonnell. At the trial of petitioner Doyle, Doyle claimed that he had planned to purchase a modest amount of marijuana from Bonnell but that he informed Bonnell that he could not afford to purchase the ten pounds which Bonnell offered him. Doyle further testified that Bonnell somehow smuggled the photocopied money into petitioners' car. At the trial of petitioner Wood, Wood gave the same exculpatory story and claimed that at the time of their arrest he and Doyle were attempting to return to Bonnell the money which he had "planted" in the car and to demand from him an explanation for why he had done so. Each petitioner also appeared as a defense witness at the other's trial and offered his story to corroborate the other's testimony.

At each trial, upon cross-examination of the defendant, the state prosecutor elicited the fact that the defendant had not offered his exculpatory story to the authorities at the time of his arrest, at his

preliminary hearing, or at any other time prior to the commencement of trial. The prosecutor elicited the same facts from each petitioner when he appeared as a defense witness at the corresponding trial. In addition, at petitioner Doyle's trial, the prosecutor elicited from Doyle the fact that he had not consented to the search of the car in which he had been riding when he was arrested; at petitioner Wood's trial, a government agent testified that Wood had not consented to the search of the car. Finally, during closing argument at each trial, the prosecutor stated that the defendant's failures to volunteer his exculpatory story at the time of his arrest or at any time prior to his testimony at trial, as well as his refusal to consent to the search of the car, raised the inference that his story had been recently fabricated.

At both trials, defense counsel unsuccessfully objected to all questions and statements regarding petitioners' prior silence and their failure to consent to the search. On appeal, the state court of appeals held that these questions and closing arguments were properly designed to test the credibility of the witnesses (App. 55-56; 61-62); the Supreme Court of Ohio denied petitioners' motions for further review (App. 67, 69).

ARGUMENT

In our brief in *United States* v. *Hale*, *supra*, we argued that the Fifth Amendment does not bar cross-examination of a defendant who has given exculpatory testimony at trial as to why he failed to offer such information at the time of his arrest. The Court

in *Hale* never reached the constitutional issue, however. Instead, it exercised its supervisory authority over the lower federal courts to weigh the probative value of such questioning against its potential for prejudice, and held that, on the facts of that case, the defendant's silence during custodial police interrogation after he had just been given *Miranda* warnings was insufficiently probative to justify admission of such evidence.

In the instant case, the constitutional question is in the forefront, since the state court has in effect determined that the evidentiary value of such questioning does outweigh its potential for prejudice. Accordingly, the constitutional arguments we set out in *Hale* are directly pertinent here. If our analysis is correct, it is permissible for state prosecutors to test the credibility of a defendant's testimony by eliciting the fact that he failed to explain seemingly incriminating circumstances at the time of his arrest. We accordingly rely upon the discussion of the constitutional issues contained in our brief in *Hale*. For the convenience of the Court, we have appended to this brief the relevant portions of our brief in *Hale*.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

APPENDIX

* * * * *

SUMMARY OF ARGUMENT

The existence of an adequate opportunity to test the credibility of a defendant who takes the stand in his own behalf is crucial to the mission of a trial—accurate ascertainment of the truth. "The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *United States* v. *Nixon*, No. 73-1766, decided July 24, 1974, slip op. 24. Exceptions to the age-old principle demanding "every man's evidence" should not be lightly created nor expansively construed. "Limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means of ascertaining truth." *Elkins* v. *United States*, 364 U.S. 206, 234 (Frankfurter, J., dissenting, cited with approval in *United States* v. *Nixon*, *supra*, slip op. at 25, n. 18).

In disallowing a form of cross-examination that exposes a testifying defendant's prior failure to explain seemingly incriminating circumstances, however, the court below ignored this precept and effec-

tively rendered a defendant immune from one of the "traditional truth-testing devices of the adversary process," *Harris* v. *New York*, 401 U.S. 222, 225. Here, respondent took the stand in his own defense and testified that on the morning of the robbery his wife had given him the cash that was found on his person soon after the robbery, for the purpose of obtaining some money orders with which she could pay some bills (Tr. 219). Cross-examination designed to discredit this explanation by revealing that respondent had failed to provide it to the police was, however, held to be violative of respondent's Fifth Amendment privilege.

We submit that the exclusion of such plainly relevant and probative evidence, going to the credibility of respondent's explanation of otherwise incriminating circumstances, finds no support in either the history or the logic of the Fifth Amendment privilege against self-incrimination. Although it may be impermissible for the prosecution to introduce as evidence of guilt the fact that the defendant chose to remain silent during post-arrest questioning, once the defendant chooses to take the stand and testify in his own behalf the privilege no longer bars the introduction of such evidence for the limited purpose of impeaching his trial testimony. *Harris* v. *New York*, 401 U.S. 222; *Raffel* v. *United States*, 271 U.S. 494.

The court of appeals' majority erroneously relied on *Griffin* v. *California*, 380 U.S. 609, and *Miranda*

v. *Arizona*, 384 U.S. 436, as governing this case. *Griffin* is critically different, however, because it involved a non-testifying defendant, so that the "whole truth" policy of *Harris* and the waiver principles of *Raffel* were not implicated. As for *Miranda*, its principal thrust was to protect against impermissible coercion of arrestees; here, respondent did enjoy a free choice between voluntary silence and voluntary speech. Either election may, of course, carry potentially disadvantageous consequences, but that is no objection so long as the choice between them is not impermissibly compelled.

Nor is a suspect's election to remain silent during custodial interrogation impermissibly burdened by the possibility that, should he decide to testify at trial regarding the seemingly incriminating circumstances of his arrest, he may also be called upon to explain to the jury why he previously failed to offer such information to the police. Such a strategically disadvantageous consequence of invoking the privilege entails nothing more than a choice about trial tactics. It is a kind of consequence inherent in our adversary system, and one that has never been found to place an impermissible burden upon the right to remain silent. See *McGautha* v. *California*, 402 U.S. 183; *Williams* v. *Florida*, 399 U.S. 78. It in no way compels an accused to waive his privilege, in terms of criteria to which this Court has referred for ascertaining voluntariness, nor does it undermine the other values that

the privilege against self-incrimination has been thought to protect.

The court of appeals also predicated its decision on the notion that it is unfair to tell a suspect that he has a right to remain silent and then make some use of that silence against him. The *Miranda* warning does not, however, make any kind of promise to the arrestee that his silence will carry with it no adverse consequences. Indeed, it could not properly do so, since, apart from the consequence at issue in this case, other more substantial and more immediate adverse consequences are likely to flow from failure to tender a satisfactory explanation of incriminating circumstances, foremost among which is the enhanced likelihood that there will be a criminal prosecution of the arrestee. Finally, with regard to the question of fairness, the court of appeals has erroneously equated the standards for assuring an informed *waiver* of a constitutional right with those that should govern a decision *not* to waive an approach that is not only unprecedented and unjustified, but revolutionary in its ramifications.

* * * * *

ARGUMENT

I. THE JURY SHOULD BE PERMITTED TO ASSESS THE CREDIBILITY OF A DEFENDANT'S TESTIMONY BY LEARNING OF HIS PRIOR FAILURE TO EXPLAIN SEEMINGLY INCRIMINATING CIRCUMSTANCES TO THE POLICE

A. *The necessity to test the credibility of a defendant's testimony and to obtain the "whole truth" requires that the jury be allowed to consider his prior failure to tell it to the police*

A defendant who takes the stand places himself in a fundamentally different position from one who does not. Once on the stand, he is subject like any other witness to cross-examination designed to assure the reliability of his testimony. Moreover, by choosing to tell his side of the story to the jury, he waives his Fifth Amendment privilege not only as to the part of his story that he wishes the jury to hear, but as to the *whole* story. We submit that both principles—the necessity for testing the truth of a defendant's testimony and the quest for the "whole" truth—make it proper to cross-examine a defendant as to why he failed to tell his story to the police.[6]

---

[6] The guilty criminal defendant has substantial incentives to commit perjury, in view of the personal consequences of a conviction. At the same time, the constraints that normally operate to discourage witnesses from prevarication apply with diminished force to the criminal defendant. These factors make it especially important to allow thorough probing of the veracity of the testifying defendant.

1. Once he takes the stand and testifies on his own behalf, a defendant may be cross-examined like any other witness as to matters reasonably related to the subject of his direct examination [7]—including matters that otherwise could not be brought to the jury's attention, such as prior convictions, *Spencer* v. *Texas*, 385 U.S. 554, 561; evidence unlawfully seized, *Walder* v. *United States*, 347 U.S. 62; refusals to testify on his own behalf at prior trials, *Raffel* v. *United States*, 271 U.S. 494, 499; or inconsistent statements made during police interrogation without proper *Miranda* warning, *Harris* v. *New York*, *supra*.

A defendant's silence during police interrogation should be no exception to this principle. Although it may be impermissible for the prosecution to introduce as evidence of guilt the fact that an accused chose to remain silent during interrogation or failed to offer an innocent explanation of seemingly incriminating circumstances, when a defendant testifies the jury should be permitted to assess the credibility of his story by learning that he previously declined to tell it to the authorities. A defendant's alibi or exculpatory testimony—often central to his defense—should not be any more immunized from accurate evaluation than the testimony of any other witness. Nor should an accused's choice to remain silent during police interrogation thereby license him to give

---

[7] See 3A Wigmore, *Evidence* § 890 (McNaughton rev. ed. 1961) and cases cited therein.

false testimony at trial, free from the possibility that he may be called upon to explain why he failed to give the exculpatory information to the authorities at the time of his arrest.

Harris v. *New York*, *supra*, provides strong support for this proposition. There, the defendant, charged with selling heroin to an undercover police officer, took the stand in his own defense and denied the sale. On cross-examination, the defendant was asked about certain statements he had made to the police that were inconsistent with his trial testimony. Those statements had not, however, been preceded by proper *Miranda* warnings, and they therefore had to be deemed presumptively coerced in violation of the defendant's Fifth Amendment privilege. *Miranda* v. *Arizona*, 384 U.S. 436. The trial judge permitted the questioning, instructing the jury that the statements attributed to the defendant by the prosecution could be considered only in determining credibility and not as evidence of guilt.

This Court held that the Fifth Amendment does not bar the introduction of such statements, although made without adequate *Miranda* warnings, for the limited purpose of impeaching a defendant's trial testimony. While such statements are irrebutably presumed to be compelled in derogation of the Fifth Amendment when admitted as evidence of guilt, the Court in *Harris* reasoned (401 U.S. at 224-225):

> It does not follow * * * that evidence inadmissible against an accused in the prosecution's

> case in chief is barred for all purposes * * *. Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process.

The Court observed that prohibiting the use of such statements would be tantamount to licensing a defendant to resort to perjured testimony in reliance on the government's disability to challenge his credibility. "But that privilege [against self-incrimination] cannot be construed to include the right to commit perjury * * * by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Id.* at 225-226.

If the jury may test a defendant's credibility by reference to prior inconsistent statements elicited in presumptive violation of his Fifth Amendment privilege, it follows that the jury should be permitted to test a defendant's credibility by reference to his prior inconsistent silence at the time of his arrest, when there has been no such violation.[8] Had respondent

[8] Two of the circuits that have considered the question whether a defendant's silence at police interrogation can be used to impeach his credibility at trial have concluded, in light of *Harris*, that such cross-examination is constitutionally permissible. Thus, in *United States* v. *Ramirez*, 441 F. 2d 950 (C.A. 5), certiorari denied, 404 U.S. 869, the defendant testified at trial that he had been coerced into selling heroin by threats of harm from strangers. On cross-examination he admitted that he had never told the police this fact, and in closing argument the prosecutor urged that this silence was not

given the police an explanation of the source of his money contrary to the one he subsequently gave at

consistent with the conclusion that the trial testimony was truthful. On appeal, the Fifth Circuit, relying on *Harris*, stated (401 U.S. at 954):

> "Once [the defendant] elected to testify and assert the defense of coercion he became subject to the 'traditional truth-testing devices of the adversary process,' including the right of the prosecution to show his prior inconsistent act of remaining silent at the time of his arrest."

See also, *United States ex rel. Burt* v. *State of New Jersey*, 475 F. 2d 234 (C.A. 3); *Agnellino* v. *State of New Jersey*, 493 F. 2d 714 (C.A. 3); *United States* v. *Quintana-Gomez*, 488 F.2d 1246 (C.A. 5); contra: *United States* v. *Brinson*, 411 F.2d 1057 (C.A. 6); *Robideau* v. *Rhay*, 431 F. 2d 880 (C.A. 9); *Fowle* v. *United States*, 410 F. 2d 48 (C.A. 9); *Johnson* v. *Patterson*, 475 F. 2d 1066 (C.A. 10), certiorari denied, 414 U.S. 868; *Deats* v. *Rodriguez*, 477 F. 2d 1023 (C.A. 10). In its latest pronouncement on the subject, the Fifth Circuit seems to have retreated slightly from its broad holding in *Ramirez*, *supra*. See *United States* v. *Fairchild*, C.A. 5, No. 74-2097, decided January 8, 1975.

The position of the Third Circuit is not altogether clear. In *Burt*, *supra*, the defendant testified that the shooting death for which he had been charged with murder had been accidental. The prosecution elicited on cross-examination the fact that, when he had been arrested for an unrelated crime soon after the shooting, the defendant had not sought to secure assistance for the victim. The lead opinion in *Burt* held that the cross-examination was permissible because the defendant's silence during police interrogation had occurred before he stood accused of the murder. The other two members of the panel, however, issued a concurring opinion on the ground that *Harris* allows impeachment by prior silence at a police station.

In *Agnellino*, *supra*, the defendant made statements to the police but failed to indicate the source of stolen goods that were found on his property. He testified at trial that he had purchased them. During closing argument, the prosecutor com-

trial, it is clear under the *Harris* holding that such explanation would have been admissible to impeach his credibility even had it not been preceded by *Miranda* warnings. The same reasoning would seem to apply even more forcefully to the instant case, where the police acted entirely properly in providing respondent full *Miranda* warnings, no statements of any kind were elicited, and there is no question of coercion.

Moreover, while the use of *statements* elicited without *Miranda* warnings may, as this Court recognized in *Harris*, give rise to an arguably "speculative possibility that impermissible police conduct will be encouraged thereby" (401 U.S. at 225)—a possibility outweighed, in the Court's view, by the benefit to the fact-finding process of giving the jury an opportunity to assess the credibility of the defendant's testimony—cross-examination such as that in the instant case, which merely apprises the jury of a defendant's *silence* before the police, obviously does not present even that nominal danger.

---

mented upon the defendant's prior failure to provide this information to the police. The lead opinion, relying upon the concurring opinion in *Burt*, held that the prosecutor's comment was permissible. The other two members of the panel, however, concurred on the basis that what the defendant had *told* the police was inconsistent with his trial testimony. They viewed *Burt* as a situation in which the defendant's *conduct* in not seeking assistance for the shooting victim was inconsistent with his testimony at trial that the shooting had been accidental.

2. By the same token, a defendant's silence during police interrogation should be no exception to the related principle that a defendant who offers himself as a witness thereby waives his Fifth Amendment privilege *without reservation*. "His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing." *Raffel* v. *United States*, *supra*, 271 U.S. at 497. Having chosen to waive the privilege at trial, therefore, a defendant should not at the same time be insulated from consideration of the import of his prior silence before the police. He "may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events"—such as his prior silence before the police— "* * * without subjecting his silence to the inferences to be naturally drawn from it." *Caminetti* v. *United States*, 242 U.S. 470, 494.

There is sound policy in requiring a defendant who offers himself as a witness to do so without reservation and in allowing the prosecution to probe all seemingly incriminating circumstances relevant to the defendant's testimony, including the fact that he previously failed to give the police the exculpatory information he gives the jury. "The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do." *Raffel*, *supra*, 271 U.S. at 499. A defendant who becomes a witness in his own behalf benefits from the opportunity to tell the jury his side

of the story. But the opportunity should not be one-sided:

> [An accused's] voluntary offer of testimony upon any fact is a waiver as to *all other relevant facts* because of the necessary connection between them all. *Any* voluntary disclosure by the accused * * * distorts the probative picture. * * * The accused has the choice at the outset [whether or not to take the stand], unhurried and with full knowledge that all questions will relate to his incrimination [8 Wigmore, *Evidence*, § 2276, pp. 459-460 (McNaughton rev. ed. 1961)].

A fair balance of advantages requires that the jury have an opportunity to hear the entire story—including the fact that the defendant previously failed to tell his side of the story to the police.

The decision of the court of appeals in the instant case squarely conflicts with the analysis of this Court in *Raffel* v. *United States*, *supra*, and affirmance in the case at bar would, we submit, require the Court to overrule *Raffel* or confine that precedent to its specific facts. In *Raffel* this Court held that it was permissible to cross-examine a defendant as to his reasons for failing to take the stand at a prior trial, when his purpose in testifying at the second trial was to rebut a witness who testified at both trials. Raffel's first trial, in which he had failed to testify, resulted in a mistrial; at his second trial on the same charge the government presented the same witness who had

appeared at the first trial. This time, Raffel chose to take the stand and rebut the witnesses' testimony. Although comment upon a defendant's failure to take the stand was prohibited by statute and judicial decision (18 U.S.C. 3481; *Wilson* v. *United States*, 149 U.S. 60), the judge then asked Raffel questions that required him to disclose that he had not testified at the first trial and to explain why he had not done so. The second trial resulted in conviction.

The Court, in an opinion by Justice Stone, determined that the Fifth Amendment privilege provides no basis for excluding the defendant's admission at the second trial that he had failed to take the stand at the previous trial because "I did not think there was enough evidence to do it" (271 U.S. at 495, note). The Court rejected the theory that the defendant's original immunity should be held to survive his appearance at the second trial (*id.* at 498-499):

> The only suggested basis for [extending the immunity beyond the first trial is the] pressure on the accused to take the stand on the first trial for fear of the consequences of his silence in the event of a second * * *. [But e]ven if, on his first trial, he were to weigh the consequences of his failure to testify * * * in the light of what might occur on a second trial, it would require delicate balances to enable him to say that the rule of partial immunity would make his burden less onerous than the rule that he may remain silent, or at his option, testify

> fully, explaining his previous silence. We are unable to see that the rule that if he testifies, he must testify fully, adds in any substantive manner to the inescapable embarrassment which the accused must experience in determining whether he shall testify or not.

Once the defendant takes the stand at the second trial, therefore, he effectively waives his immunity retroactively as to both trials, since "[w]e can discern nothing in the policy of the law against self-incrimination which would require the extension of the immunity to any trial or to any tribunal other than that in which the defendant preserves it by refusing to testify." 271 U.S. at 499.

If a defendant under such circumstances waives his Fifth Amendment privilege respecting inquiry into his failure to testify at a prior trial, it follows that a defendant who takes the stand at his trial also waives any Fifth Amendment privilege he may have relating to his silence during police interrogations. Like Raffel's choice not to testify at his first trial, respondent in his encounter with the police chose not to tell them where he obtained the money found on his person. We submit that his omission, like Raffel's, can properly be revealed to the jury to aid them in assessing his credibility. Any other rule unacceptably enhances the prospect that jury verdicts will be based upon fabricated accounts not adequately tested by cross-examination.[9]

---

[9] *Stewart* v. *United States*, 366 U.S. 1, cited by the majority below, is not inconsistent with *Raffel*. In *Stewart*, a defendant who pleaded not guilty by reason of insanity took the stand and made various unintelligible statements. During cross-examination the prosecutor elicited the fact that the defendant had not testified during two previous trials, which had resulted in convictions that were reversed on appeal. In ruling this cross-examination improper, the Court noted that neither *Raffel* nor *Grunewald* was applicable, since the cross-examination in *Stewart* sought to discredit the claim of insanity rather than to impeach the defendant's testimony.

B. *Neither Griffin nor Miranda requires the result reached by the court of appeals*

Neither *Griffin* v. *California*, *supra*, nor *Miranda* v. *Arizona*, 384 U.S. 436, both relied upon by the majority below, is inconsistent with this analysis. At most, those cases express the proposition that a defendant may, in accord with his Fifth Amendment privilege, remain silent without his silence being used against him *as evidence of guilt*. But that proposition is fully consonant with use of a defendant's silence as evidence of his prevarication on the witness stand.

1. The defendant in *Griffin* was convicted of first degree murder after a jury trial in which he chose not to take the stand in his own defense. The trial court instructed the jury that, while the defendant had a constitutional right not to testify, and his failure to deny or explain incriminating circumstances of which he had knowledge did not create a presumption of guilt or relieve the prosecution of any of its burden of proof, the jury could take defendant's failure to testify as to such evidence into consideration "as tending to indicate the truth of such evidence and as in-

dicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable" (380 U.S. at 610). In closing argument, moreover, the prosecution made several allusions to the defendants' failure to deny or explain incriminating circumstances. On those facts, the Court reversed Griffin's conviction, holding that such comments to the jury about a defendant's failure to testify violated the defendant's Fifth Amendment privilege.

The Court in *Griffin* was concerned about the direct use of a defendant's decision not to testify (which was undeniably an invocation of his privilege against self-incrimination) as affirmative evidence of guilt. "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into *evidence against him* is quite another." 380 U.S. at 614 (emphasis added). The Court neither said nor implied that the same rule would apply to evidence used to impeach a defendant's trial testimony, nor did the Court mention *Raffel, supra,* which permits comment upon a defendant's failure to take the stand at a previous trial for the purpose of impeaching his testimony at a subsequent trial. Indeed, it seems clear that the decision in *Griffin* did not call into question the holding in *Raffel*, since at the time *Raffel* was decided it had long been the rule in federal courts that no comment could be made upon a defendant's failure to

take the stand. See *Wilson* v. *United States, supra*; 18 U.S.C. 3481."[10]

Moreover, the situation in *Griffin* presented a problem that is absent in circumstances such as *Raffel* or the instant case. Under the approach followed by the California courts in *Griffin*, the jury was expressly encouraged to infer that unexplained incriminating circumstances were true, and the defendant, since he did not testify, had no opportunity to rebut the inference. As a result of invoking the privilege in *Raffel* (and of remaining silent in the instant case), however, the defendant at most risked being called upon to explain why he previously failed to take the stand or provide information. The jury may disbelieve his explanation, and their disbelief will cast doubt upon the veracity of his present testimony. On the other hand, the jury may be sufficiently satisfied with the explanation that any unfavorable inference otherwise flowing from his previous silence is effectively rebutted. Thus, in *Raffel*, as in the instant case but unlike *Griffin*, the defendant had an opportunity to eliminate any unfavorable inference resulting from his silence, and the accuracy of the inference was "subject to the normal testing process of an adversary trial." *Michigan* v. *Tucker*, 417 U.S. 433, 449.

2. The court of appeals' reliance on *Griffin* was

---

[10] The Court has specifically reserved the related question whether an accused is constitutionally entitled to have the jury instructed that his silence must be disregarded. *Griffin, supra,* 380 U.S. at 615, n. 6. See also *Bruno* v. *United States*, 308 U.S. 287, 292.

predicated on its conclusion that respondent, like Griffin, was "exercis[ing] his constitutional right to remain silent" and that the cross-examination constituted an attempt to penalize him for assertion of this right (Pet. App. A, p. 10A). The court of appeals did not independently analyze the validity of its focal postulate that respondent was exercising a "constitutional right" when he remained silent and was impermissibly penalized therefor when cross-examined, but simply relied upon the following dictum contained in a footnote in *Miranda* (384 U.S. at 468, n. 37):

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.

In considering whether this dictum should now be elevated into a constitutional holding, the circumstances of its utterance merit attention: (1) None of the cases before the Court in the *Miranda* group involved defendants who had stood silent or whose silence had been used in any manner against them at trial; (2) since the thrust of the Court's rationale in *Miranda* focused upon the inherently coercive effects found by the Court to accompany custodial interrogation, the characterization of an arrestee's voluntary silence as an exercise of the Fifth Amendment privilege was logically unrelated to the theme of co-

ercion that dominated the Court's opinion; and (3) the quoted statement contained no explication of the basis for the conclusion it contained, and the case law cited in support of the conclusion (by "cf."), including *Griffin*, dealt with quite distinct situations.

In our view, the Fifth Amendment privilege does not confer any *per se* "right to remain silent" as a personal entitlement that the government is affirmatively obliged to fulfill. The obligation that the Fifth Amendment privilege imposes upon the government is a negative one to avoid compulsion, and the correlative right is to be free from being *compelled* to speak. Cf. *Michigan* v. *Tucker*, *supra*. The right to be free from improper compulsion is by its nature not a right that the individual *exercises* but, rather, one that he enjoys.[11] Accordingly, it was not only too facile, but also erroneous, to characterize the cross-examination to which respondent was here subjected as a penalty for the exercise of a right.[12]

---

[11] By contrast, the ordinary application of the self-incrimination provision requires an affirmative assertion of a colorable claim that the information sought of the individual may tend to incriminate him. See, *e.g.*, *United States* v. *Kordel*, 397 U.S. 1, 10; *Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 113.

[12] Theoretically, a similar analysis might be adduced in the case of the non-testifying defendant. However, the treatment of such a defendant's failure to take the stand as an "invocation" of the privilege against self-incrimination is firmly rooted in our law and reflects a reasonable presumption that such a defendant, if called to the stand, would invoke the privilege (he is, of course, not permitted to be called, because of the risk of impermissible prejudice if he is forced to claim possible

But even putting to one side these conceptual objections to the *Miranda* dictum and accepting it as a correct statement of the governing rule, it is properly understood as a bar to use of a defendant's silence during interrogation only in the government's case-in-chief. Following the logic of *Harris* and *Raffel*, and the principles of impeachment and Fifth Amendment waiver enunciated therein, the dictum would not prohibit asking a defendant on cross-examination, for the purpose of impeaching his trial testimony and eliciting his "whole" story, why he remained silent at the time of arrest.

II. TESTING OF A DEFENDANT'S CREDIBILITY BY REFERENCE TO HIS PRIOR FAILURE TO GIVE HIS STORY TO THE POLICE NEITHER COERCES NOR IMPERMISSIBLY BURDENS HIS CHOICE TO REMAIN SILENT BEFORE THE POLICE, NOR IS IT UNFAIR

The court of appeals' conclusory assertion that use of an accused's silence at police interrogation to impeach his trial testimony is tantamount to a penalty upon the exercise of his Fifth Amendment privilege may also rest upon the unarticulated promise that

---

self-incrimination before the jury). Whatever may be said of the exercise-of-right/penalty analysis in the *Griffin* context, however, we believe it would be inappropriate to extend it to the instant circumstances. Moreover, the situations are distinguishable insofar as the practice of comment and inference on a defendant's failure to take the stand entails a perceptibly greater hazard of prejudice flowing from the act of exercising the right (rather than simply the reasonable inferences arising from silence) than is present in the instant situation.

this consequence impermissibly burdens the choice to remain silent. If this was the premise, however, it is difficult to see where the impermissible burden arises. In the first place, it seems to us speculative and even unlikely as an empirical matter that a defendant will be deterred from remaining silent during police questioning by the mere possibility that, should he testify at trial, he then might be called upon to explain why he had not earlier offered his story to the authorities, and that the jury then might be dissatisfied with his explanation. Such an adverse consequence is so remote from the circumstance of police interrogation and—assuming the defendant has a reasonable explanation for why he chooses to remain silent—so unlikely, that it cannot be assumed to have a real deterrent impact upon the decision to remain silent during police interrogation.

But even if it had some such effect, it does not follow that this represents an impermissible burden on the exercise of a constitutional right; rather, we submit that it represents a proper consequence of the defendant's election to withhold any explanation of suspicious circumstances from the police, while choosing to provide one at trial. In the following discussion we show that this consequence is considerably less onerous than many other constitutionally sanctioned consequences of choosing to remain silent, and that it does not improperly compel an accused to speak against his will. We next show that there is nothing "unfair" in telling an accused that he may remain silent without telling him of all possible adverse con-

sequences that could flow from his decision to remain silent. Finally, we show that use of an accused's silence at the time of arrest to impeach his trial testimony does not jeopardize any of the values that the Fifth Amendment privilege is thought to protect.

A. *The possibility of impeachment of a defendant's testimony by reference to his prior silence is a far less severe detriment than other disadvantages that this Court has held may constitutionally attach to exercise of the privilege against self-incrimination, nor does it constitute an impermissible compulsion to answer police questions.*

Even assuming that the Fifth Amendment privilege is the source of an arrestee's right to silence and that the privilege is fulfilled only when he is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will," *Miranda* v. *Arizona*, *supra*, 384 U.S. at 460; *Malloy* v. *Hogan*, 378 U.S. 1, 8, it does not follow that, in order to be "unfettered," the choice must be without consequence. On the contrary, "nothing in the logic or purposes of the privilege demands that all consequences which may result from a witness' silence be forbidden merely because that silence is privileged. The validity of a consequence depends both upon the hazards, if any, it presents to the integrity of the privilege and upon the urgency of the public interests it is designed to protect." *Garrity* v. *New Jersey*, 385 U.S. 493, 507 (Harlan, J., dissenting).

1. We have already adverted to the "strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce." *Michigan* v. *Tucker*, *supra*, 417 U.S. at 450. Manifestly, this includes knowledge of the defendant's failure to explain seemingly incriminating circumstances to the police at a time when the accuracy of the explanation could have been independently verified. On the other hand, from the standpoint of the accused, the possible adverse consequence at trial of remaining silent at police interrogation represents no hazard to the integrity of the privilege. Indeed, the consequence is nothing more than a nominal strategic disadvantage at trial: the possibility that, if he provides an alibi or exculpatory testimony at trial, he may be called upon to explain why he failed to offer information to the police, and the jury might be dissatisfied with his explanation.

This consequence simply does not amount to "compulsion" in the sense relevant for bringing the protection of the self-incrimination provision into play—*i.e.*, the kind of circumstance "likely to exert such pressure upon an individual as to disable him from making a free and rational choice," *Garrity* v. *New Jersey*, *supra*, 385 U.S. at 497. It does not remotely resemble "the lurid realities which lay behind the enactment of the Fifth Amendment * * *, the pain of incarceration, banishment, or mutilation," *Griffin* v. *California*, *supra*, 380 U.S. at 620 (Stewart, J., dissenting). It is a far cry from such "penalties" for

silence as third-degree torture, *Brown* v. *Mississippi*, 297 U.S. 278; prolonged isolation from family or friends in a hostile setting, *Gallegos* v. *Colorado*, 370 U.S. 49; physical and mental exhaustion from subjection to seemingly endless interrogation, *Watts* v. *Indiana*, 338 U.S. 49; loss of job, *Garrity* v. *New Jersey*, *supra;* or subjection to the kinds of police interrogation practices described in *Miranda* itself.

2. In fact, the possibility of such a strategic disadvantage at trial following upon silence during police interrogation is far less grave than many similar strategic disadvantages permissibly following upon invocation of the privilege in other circumstances. "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. * * * The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved." *McGautha* v. *California*, 402 U.S. 183, 213.

In *McGautha*, this Court faced a Fifth Amendment challenge arising from the dilemma confronting a defendant in a capital case under a state unitary trial procedure, in which guilt and sentence were decided by the jury in a single proceeding. The petitioner alleged, among other things, that his decision to exercise his constitutional right to avoid self-incrimination by not taking the stand at trial was unconstitutionally penalized by the fact that, by failing to take the stand, he lost his opportunity to be heard by the jury in mitigation of sentence and therefore suffered an

increased risk of being sentenced to death. Present also was the suggestion that other defendants facing the dilemma would feel compelled to waive their right not to testify on guilt or innocence in order to secure an opportunity to testify in mitigation of sentence. After assaying the various tactical choices facing an accused during and before a criminal trial, Justice Harlan concluded in his opinion for the court that the pressures that might cause similarly situated defendants to furnish arguably testimonial or incriminating information were no different from other pressures licitly generated by the innate complexity of criminal litigation (402 U.S. at 216-217):

> We are thus constrained to reject the suggestion that a desire to speak to one's sentencer unlawfully compels a defendant in a single-verdict capital case to incriminate himself, unless there is something which serves to distinguish sentencing—or at least capital sentencing—from the situations given above. Such a distinguishing factor can only be the peculiar poignancy of the position of a man whose life is at stake, coupled with the imponderables of the decision which the jury is called upon to make. We do not think that the fact that a defendant's sentence, rather than his guilt, is at issue creates a constitutionally sufficient difference from the sorts of situations we have described.

The Court's rationale, realistically taking account of the accused's inherent need to make tactical judgments about the conduct of his defense to criminal

charges against him, would seem to apply with equal or greater force to the instant case. Just as a defendant's decision to waive his Fifth Amendment privilege for the purpose of mitigating his sentence is not constitutionally distinguishable from his decision to waive his privilege for the purpose of testifying in his own behalf, so too an arrestee's decision to "waive his privilege" at police interrogation for the far less drastic purpose of avoiding impeachment when he testifies at trial is constitutionally indistinguishable from his decision to waive his privilege at trial. Indeed, it is also procedurally indistinguishable, since an accused at police interrogation will feel induced to waive his privilege for this reason, if at all, only to the extent that he actually plans to waive his privilege at trial. Cf. *Brady* v. *United States*, 397 U.S. 742; *McMann* v. *Richardson*, 397 U.S. 759; *Parker* v. *North Carolina*, 397 U.S. 790.

An arrestee's evaluation of his options in deciding whether to speak or remain silent in response to police questions will depend upon many factors, such as his perception of the amount of information that the police already have obtained; his assessment of the likelihood that, should he cooperate with the police, he will be able to allay their suspicion and avoid subjection to criminal charges; or his expectation that by cooperation he may obtain more lenient treatment from the court. The decision whether to give exculpatory information is likely to be governed by the relative ease with which the authorities could verify the information and the likely impact of the

information on their assessment of his guilt or innocence. If a relatively simple explanation of suspicious circumstances can lead to an arrestee's quick release from the criminal process, it seems to us likely as an empirical matter that he would offer it. There is, in any event, no basis for concluding that one additional factor in the calculus—the likelihood that if the exculpatory information is not offered to the police, and the arrestee is prosecuted, and he decides at trial to take the stand in his own behalf, he may then be required to explain his prior silence—would materially influence the decision to speak or remain silent, let alone that it would be so weighty as to overwhelm his ability to make a rational and voluntary choice.[13]

---

[13] In considering the question whether our position threatens to impose a constitutionally intolerable burden on the arrestee's decision to speak or remain silent, it is useful to distinguish between those who are guilty of the offense of which they are suspected and those who are not. While we do not suggest that the guilty have any less right to be free from governmental compulsion to speak than the innocent, we do submit that their decision to stand mute is likely to flow from the fact that they have no satisfactory explanation to tender; they are thus unlikely to feel compelled to provide an explanation to the police by the prospect that a fabricated story presented at trial will be subject to impeachment in this manner.

Many innocent persons who can offer an explanation for seemingly incriminating circumstances will, of course, elect to do so in the hope that such action will bring about a speedy and favorable termination of police suspicions. Such persons, like the guilty, clearly would be unaffected in their election to speak

3. *Williams* v. *Florida*, 399 U.S. 78, like *McGautha*, dealt with and sustained a procedure that imposed substantial adverse consequences on an exercise of the privilege. The Court in *Williams* upheld a notice-of-alibi statute requiring that a defendant who planned to present an alibi defense at trial provide the prosecution with the names of alibi witnesses before trial. It concluded that the statute does not unconstitutionally burden the defendant's Fifth Amendment privilege, even though failure to comply could result in exclusion of the alibi evidence at trial. The defendant in that case complied with the notice-of-alibi rule, and the state prosecutor used a deposition of the defendant's alibi witness to impeach the witness's testimony. The defendant claimed on appeal that his privilege

---

by questions of possible future impeachment, since their choice is to speak in any event.

That leaves the group of arrestees who, although innocent and/or possessing a valid exculpatory explanation of seemingly suspicious circumstances, choose not to respond to police questioning—perhaps from fear or distrust of the police, perhaps from instinctive caution, timidity, or belligerence, perhaps in alherence to advice of counsel. Only as to this group could the possible future consequences of failure to respond to police inquiry materially affect the decision whether or not to speak. But these individuals already face immediate and substantial "compulsive" considerations, such as the prospect that their silence will result in the bringing of criminal charges against them. If they find the compulsion of such considerations resistible, it is hard to imagine that the remote and speculative possibility of adverse consequences at trial will provide meaningful compulsion to speak.

In short, it will as an empirical matter be the rare case indeed in which the possibility of future impeachment will actually operate to induce an arrestee to speak.

against self-incrimination was thereby violated, since he had been required to furnish the State with information useful in convicting him, under penalty of being prohibited from presenting his alibi witness. This Court disagreed (399 U.S. at 83-85, emphasis supplied):

> The defendant in a criminal trial is frequently forced to testify himself * * * in an effort to reduce the risk of conviction. * * * That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against self-incrimination.
>
> * * * * *
>
> At most, the rule only compelled petitioner to *accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial. Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense* * * *.

Although pre-trial silence would of course have subjected Williams to the significant strategic disadvantage at trial of being barred from presenting an alibi defense, this consequence was not considered to impose an impermissible burden upon his election whether to remain silent.

The same logic would seem to compel a reversal in the instant case. If in consequence of maintaining

silence prior to trial a defendant may be barred *altogether* from presenting his alibi defense during trial, surely it is permissible—and far less burdensome—to attach as a consequence of a defendant's silence in response to police questions the possibility that he may be asked to explain his silence should he subsequently decide to offer an alibi or exculpatory testimony during trial. We reiterate in this connection that his failure to present his story to the police does not bar him from presenting his story to the jury, as silence would have in *Williams*: it simply entitles the jury to know, when he presents it to them, why he failed to give the information to the authorities at the time of his arrest. At most, an arrestee who plans to take the stand and tell his story at trial, if concerned that he might then be asked to explain his previous silence, may be somewhat more likely to "accelerate the timing of his disclosure" than otherwise. But this consideration is hardly tantamount to an unconstitutional burden upon his choice to remain silent.

Nor does this consequence of choosing to remain silent at police interrogation unconstitutionally burden a defendant's decision to take the stand at trial. A defendant who contemplates testifying in his own behalf is faced with many analogous—indeed, considerably more burdensome—disadvantages. Once he takes the stand, he cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination, see, *e.g.*, *Brown* v. *United States*, 356 U.S. 148, *Fitzpatrick* v. *United States*, 178 U.S. 304, 314-316; he

may also be impeached by proof of prior convictions, *Spencer* v. *Texas*, *supra*, 385 U.S. at 561; and if his motion for acquittal at the close of the government's case is denied, he risks bolstering the government's case sufficiently to support an otherwise unjustifiable verdict of guilty if he puts on a defense, *e.g.*, *United States* v. *Calderon*, 348 U.S. 160, 164.

In sum, whatever the inducement that might be felt by an arrestee to respond to police questioning because he otherwise might be asked to explain at trial why he had not provided the same explanation to the police (or that might be felt by a defendant at trial to forego his opportunity to take the stand for the same reason), such inducement "does not derive from any coercion of the State, instead it arises from the desire of the accused to act in his own enlightened self-interest." *Segura* v. *Patterson*, 402 F. 2d 249, 253 (C.A. 10). An arrestee may feel slightly more induced to provide the police with exculpatory information than he otherwise would, or a defendant slightly more deterred from taking the stand, but only marginally so, and only to the extent that one course of action thereby becomes tactically more advantageous than another.

B. *It is not "unfair" to advise an accused that he has a right to remain silent and then use his silence to impeach his trial testimony*

Contrary to the assertion of the court of appeals, we see nothing "unfair" about advising an arrestee that he has a "right to remain silent" and then using

his silence to impeach his trial testimony although he had not been warned of this possible development. The fact that future impeachment use may result from silence does not make it untruthful to advise a suspect that he has a right to choose silence. An accused is *not* advised that his choice to remain silent cannot be used against him.

Moreover, as has already been indicated, a defendant faces many tactical disadvantages from choosing to remain silent at different stages of the criminal process, and there is no warrant for assuming that these choices are uninformed simply because all the possibly disadvantageous consequences stemming therefrom are not spelled out of every juncture. Cf. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226. An accused who has an innocent explanation for otherwise incriminating circumstances certainly can be assumed to know that the consequence of choosing silence during police questioning is the rather drastic one of facing potential indictment, possible pretrial detention or bail, and trial.

The reason for requiring that an accused be told that he has a "right to remain silent" is to counteract what are thought to be coercive aspects of incommunicado police questioning. *Miranda* v. *Arizona*, *supra*, 384 U.S. at 457, 458. So long as the interrogation is fair and noncoercive, therefore, the accused presumably enjoys the "right" that he has been promised, and there is nothing misleading about advising him of this choice. Thus, in the instant case, there can

be no question that the goals of the *Miranda* decision were served when respondent was given the election between speaking voluntarily and voluntarily remaining silent.

To the extent that the court of appeals discerned unfairness because of a surmise that respondent may have decided to remain silent in reliance on an implied promise that his silence would not be used against him at trial, it presupposes that the decision to remain silent must be as carefully circumscribed with assurances that it be "informed" as is the decision to speak. But this is tantamount to a requirement that the government provide warnings about all the possibly adverse consequences that may flow from invocation of constitutional rights—a requirement that has no logical foundation in the recognized need to assure that *waiver* of constitutional rights be knowledgeable. To assume that an accused has been somehow tricked into invoking his "constitutional privilege" because he may not have been aware of certain disadvantages that accompany its invocation is a peculiar notion that has no analog in the law of voluntary waiver or entrapment.[14]

---

[14] If this were indeed the ground of the court's decision, it implies that the cross-examination at issue would pass constitutional muster had respondent been apprised at police interrogation that, should he decide to take the stand at trial, his prior silence could then be used to impeach his credibility. While we have no objection to modifying the warnings in the future to provide such notice if this Court deems such modification necessary to assure fairness to arrestees, it seems to us that the addition of such a statement might tend to confuse an arrestee about his constitutional rights and make it more difficult for him to understand the *Miranda* warnings.

Johnson v. *United States*, 318 U.S. 189, 197, cited by the majority below, dealt with a defendant's decision whether to invoke the privilege at trial during the course of his trial testimony, without first being warned by the court that it would allow the prosecution to comment upon any claim of privilege as evidence of the truth of unexplained incriminating facts. This Court held that it would be unfair to allow the jury to consider the fact that the accused invoked the privilege under these circumstances, where "that action may be said to *affect materially* the accused's choice of claiming or waiving the privilege and results in prejudice." *Ibid.*; emphasis added. Use of an arrestee's silence at police questioning for the limited purpose of impeaching his trial testimony, however, could not be said to "materially affect" his choice of claiming or waiving the privilege.

C. *The constitutional values and policies reflected in the privilege against self-incrimination were not impaired by the cross-examination of respondent*

The values thought to be reflected by the privilege against self-incrimination were comprehensively catalogued by the Court in *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 55:

> The privilege against self-incrimination * * * reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment or abuses; our sense of fair play [and] * * * respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," *United States* v. *Grunewald*, 233 F. 2d 556, 581-582 (Frank, J., dissenting), rev'd 353 U.S. 391; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter for the guilty," is often "a protection to the innocent." *Quinn* v. *United States*, 349 U.S. 155, 162 [footnote omitted].

The cross-examination in the case at bar did not undermine these values.

a. A suspect whose failure to respond to police questions may be used to impeach his trial testimony is not exposed to the "cruel trilemma of self-accusation, perjury, or contempt." Respondent was free to make a false statement or to remain silent (as he in fact did), without any fear of invoking at least two of the penalties of the "cruel trilemma"—perjury and contempt.

b. Neither would the rule for which we contend subvert the preference for an accusatorial system of criminal justice. Confessions, so long as they are voluntarily made, have a recognized and valid place in our accusatorial system. Since, for the reasons we have previously discussed, the possible use of silence for impeachment does not impair the voluntary character (in the constitutionally relevant sense) of the

arrestee's election to speak or stand mute, the rule would not perceptibly alter the existing character of our accusatorial system.

c. Nor would such use increase the likelihood of inhumane treatment. Since it is an arrestee's *silence*, rather than any statements elicited by the police, that is used to discredit his trial testimony, the police have no incentive to violate the law and elicit statements coercively—an arguably "speculative possibility" of the rule enunciated in *Harris*, *supra*. Indeed, if such use of silence during custodial interrogation modifies police behavior in any direction, its likely tendency is to preserve an accused's right to remain silent by diminishing the determination of the police to procure a statement.

d. Nor are values of privacy jeopardized by such use of an accused's silence during police interrogation to impeach his trial testimony. Unlike a witness before a grand jury or legislative committee, whose appearance is not necessarily predicated on probable cause, a suspect lawfully arrested by the police has already satisfied the threshold requirement of probable cause. Moreover, by the time the prosecution makes reference to his silence, the individual has already gone to trial and has chosen to testify in his own defense. Indeed, he will choose to reveal personal information to the police, if at all, only to the extent that he plans to testify at trial and in so doing reveal the same personal information to the jury. Cf. *Williams* v. *Florida*, *supra*. This inducement to reveal personal information is therefore no more an assault

on his privacy than is necessarily entailed by his own tactical choices within the legitimate criminal justice process.

e. Finally, this case implicates no concerns about the trustworthiness of "self-deprecatory statements." *Miranda*, *supra*, 384 U.S. at 455, n. 24, and 470; see 8 Wigmore, *Evidence*, § 2251 (McNaughton rev. ed. 1961). At most, an accused may decide that it is better to reveal his exculpatory evidence earlier (at police interrogation) rather than later (at trial). In no event, however, will the mere possibility that his silence at police interrogation might be subsequently used to discredit his testimony induce him to make unreliable self-deprecatory statements.

Under these circumstances—given that the only burden upon invocation of the privilege is a strategic disadvantage at trial of the sort inherent in our adversary system, and given the absence of any significant encroachment upon the policies or values reflected by the privilege—the decision below has failed to overcome the burden of justifying the exclusion of relevant evidence enhancing the jury's ability to assess the credibility of respondent's testimony. As Mr. Justice Frankfurter observed in *Nardone* v. *United States*, 308 U.S. 338, 340, "[a]ny claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land." No such justification can be demonstrated here.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 212793 192


see
75
5015